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NAVALI:
OR, A
TREATISE
OF
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In Three BOOKS.

The SEVENTH EDITION carefully Corrected, with the Addition of ſeveral Hundred References and many Modern Caſes never before Printed.

By *Charles Molloy*, late Barreſter at Law.

LONDON:
Printed for JOHN WALTHOE, *Junior*, over-againſt the *Royal Exchange* in *Cornhill*, and J. WOTTON at the Three *Daggers* in *Fleet-ſtreet*. 1722.

To the Right Honourable

JAMES Earl of *Berkley*, Vice-Admiral of *Great-Britain*, Primier Commiſſioner for Executing the Office of Lord High-Admiral of *Great-Britain*, and *Ireland*, &c. Knight of the moſt Noble Order of the Garter, Gentleman of His Majeſty's Bed-Chamber, and One of the Lords of His Majeſty's Privy Council.

MY LORD,

AS your Lordſhip is very juſtly placed at the Head of the greateſt, beſt diſciplin'd, and moſt victorious Fleet in the World, I ſhould be wanting in my Duty to your Lordſhip, if I did not lay this new Edition of the following Treatiſe written by my Father (on Naval Maritime Affairs) at your Lordſhip's Feet.

It had the Honour to make its firſt Appearance in Publick, under the Protection of one of your Lordſhip's Predeceſſors in the Admiralty, which

I hope will be its Excuſe for ſollici-ting on this Occaſion, a Patronage of the ſame Dignity, and of a no leſs illuſtrious Name.

What Credit it deſerves, and how ſerviceable it has been and may be to my Country, is humbly ſubmitted to your Lordſhip's Conſideration, the Book is too near related to me, to mention what the World has ſaid in its Praiſe, 'tis the Uſefulneſs of it alone that can recommend it to your Lordſhip, to whom every thing is dear, that tends to Publick Good.

Permit me, my Lord, moſt humbly to entreat your Acceptance of this Addreſs, and to pardon the Liberty I have taken herein, and to aſſure your Lordſhip that it flows from the near-moſt Dictates of an honeſt and a grateful Mind; for I am with the moſt dutiful and profound Reſpect,

My LORD, your Lordſhip's

Moſt Obedient, and

Moſt Humble Servant,

Charles Molloy.

TO THE
READER.

THE Wiſdom of God is highly to be admired who hath not endowed the other living Creatures with that Sovereign Perfection of *Wiſdom*, but hath ſecured and provided for them by natural Muniments from Aſſault and Peril and other Neceſſities: But Man he formed Naked and Frail, becauſe of furniſhing him with Wiſdom, Underſtanding, Memory and Senſe to govern his Actions; endowing him with that pious Affection of deſiring Society, whereby one is inclined to Defend, Love, Cheriſh and afford mutual Aid to each other: Nor hath he in no leſs wonderful manner (infinitely tranſcending all humane Wiſdom and Underſtanding) Created the material World to be ſubſervient to his Being and Well-being: Yet without human Underſtanding and Reaſon did he not build a Ship, raiſe a Fort, make Bread or Cloth; but theſe came to paſs only by human Arts and Induſtry, in which by the Revolutions of the Celeſtial Bodies, Times and Seaſons, Materials and other Neceſſaries are brought forth, by the Alteration of which Men in their proper Seaſons reap the Fruits of their Labour; ſo that there is no Society, * Nation, Country or Kingdom but ſtands in need of another: Hence it is that Men knowing each others Neceſſaries, are invited to *Traffick* and *Commerce* in the different Parts and Immenſities of this vaſt World to ſupply each others Neceſſities, and adorn the Conveniencies of humane Life.

Lactantius lib. 9.

* *Seneca* 4. *de Beneficiis, cap.* 18.

And as God hath ſo ordered this wonderful Dependance of his Creatures on each other, ſo hath he by a Law immutable provided a Rule for Men in all their Actions, obliging each other to the Performance of that which is right, not only to Juſtice *, but likewiſe to all other Moral Virtues; the which is no more *but the dictate of right Reaſon founded in the Soul of Man, ſhewing the neceſſity to be in ſome act by its convenience and diſconvenience in the rational Nature of Man, and conſequently that it is either forbidden or commanded by the Author of Nature, who is the Eternal Creator of all things.* And as God hath imprinted this univerſal Law in the Minds of all Men, ſo hath he given Men Power (Society being admitted) to eſtabliſh other Laws which proceed from the Will, the which is drawn from the Civil Power, that is, from him or them that Rule the Common-wealth or Society of Freemen united for their common Benefit, (which is called the *Laws of Nations*) and which by the will of all or many Nations, hath received force to oblige, and is || proved by a continued uſe and Teſtimony of Authentick Memorials of Learned or Skilful Men.

* *Leg. ut vim. D. de juſt. & jur. n. 7, & 8.*

|| *Vaſquez 2. Controv.* 54.4.

Now by the Laws of Nature every Man is bound to profit another in what he can *, nor is the ſame only Lawful but Commendable; ſo true was that ſaying, *Nothing is more ſerviceable to Man than Man* ||: But if Man ſhall neglect this immutable Law in the aiding and aſſiſting his Fellow Citizen, and inquire and diſpute why God hath laid this Neceſſity upon him; and when Opportunity gives leave to take the benefit of Wind or Tide, (in order to his furniſhing himſelf or Neighbour with thoſe things that adorn humane Life) to diſpute the Cauſes of their Flux and Reflux, and how they Vary and Change; he not only offends the Laws of Nature, but aſſumes

* *Florentius 3. part. tit. 22. Sect 5. Leg. Servus D. de ſerv. export*

|| *Cicero Offic. lib* 11. *de Panetio.*

ſumes a power of deſtroying Society, and conſequently becomes (at the leaſt) a wilful Tranſgreſſor of the Laws of Nations.

And though the Eternal Power hath ſo Eſtabliſhed this neceſſity in Mankind, that every Man ſhould ſtand in need of another Man, yet ſo great a Providence is over induſtrious Men, that ſcarce any Man not diſabled by Nature or Accident, Sickneſs, Impotency, and the like, but by his induſtry and pains may earn more than would ſupply his Neceſſities; and ſo much as any Man gets by being truly induſtrious above what ſupplies his Neceſſities, is ſo much beneficial to himſelf and Family, as alſo an enriching to that Kingdom or State where he reſides: From whence it is, That all Mankind (preſent or to come) are either Traders by themſelves or others; and the Ends deſigned by Trade and Commerce, are Strength, Wealth and Imployment for all Sorts of People, (where the ſame doth moſt flouriſh) the End * tending to the Advancement, Opulency, and Greatneſs of ſuch a Kingdom or State.

* *Coke.* 2. *Inſt. fol.* 28.

Conſtantinople (the Throne once of Chriſtendom) having been ſack'd by *Mahomet* the Second, became a place of deſolation as well as horror, yet he by granting a free Trade and Religion, ſoon after repeopled that great (but unhappy) Spot. Nor did *Silemus* tread amiſs in following the ſteps of his Victorious Predeceſſor, when having the like ſucceſs on *Tauris* and *Grand Cairo*, he tranſlated the *Perſian* and *Egyptian* Artificers and Traders to that repeopled City, following the Example of the *Roman* Virtues. Nor did our Victorious Third *Edward* deem it an Act unbeſeeming his great Wiſdom, when he brought in the *Walloons*, whoſe Induſtry ſoon eſtabliſhed the Woollen Manufacture, he vouchſafing to

Anno 1453. *Vide Knowles* Hiſtory of the Monarchy.

Mirror, Cap. 5. *Sect.* 2.
11 *Ed.* 3 *cap.* 3.

give no leſs a Security for the enjoying their then granted Immunities and Privileges, than his own Royal Perſon. Nor did that politick Princeſs * ſhut her Ears from embracing the Offer of thoſe diſtreſſed *Burgundians* (after the Example of her Great and Royal Predeceſſor) who ſought Refuge in her Dominions from the rigid Severity of the long-bearded *Alva*, who planting themſelves by her appointment at *Norwich*, *Colcheſter*, *Canterbury*, and other Towns, have of thoſe places (then only Habitations for Beggars) raiſed them now in competition with (if not excelling) all, or moſt of the Cities in *England*, for Riches, Plenty, and Trade. Nor need we run into the Hiſtory of earlier Times to give an Account of the many Kingdoms and States that have riſen by Induſtry and Commerce; 'tis enough if we caſt our Eyes on our Neighbour the *Hollander*, a place by relation of *Ortelius*, not much bigger than *Yorkſhire*, and ſuch a Spot, as if God had reſerved it as a place only to dig Turf out of, for the accommodating thoſe Countries wherein he hoards up the miſeries of Winter, it affording naturally not any one Commodity of uſe; yet by Commerce and Trade (the Daughters of Induſtry) it is now become the Store-houſe of all thoſe Merchandizes that may be collected from the riſing to the ſetting of the Sun, and gives thoſe People a Name as large and high as the greateſt Monarch this day on Earth: Nor need we paſs out of Chriſtendom to find Examples of the like, when *Venice*, *Genoua*, *Lubeck*, *Embden*, and the reſt of the *Hanſiatick* Towns (once the Marts of the World, till Sloth, Luxury, and Ambition got within their Walls, and drove it to Ports of Induſtry) that have ſince kiſt and embrac'd it, the which this Iſle, by the Influence of his Royal Majeſty hath been no ſmall ſharer in.

* *Vide Camdens Q. Elizabeth, An.* 1568.

A. E. Meteran, Hiſtor. Belg. lib. 3.

Hence it is, that Trade and Commerce are now become the only Object and Care of all Princes and *Potentates*, its Dominion not bing acquired *by the* ruful Face of War, whoſe Footſteps leave *behind* them the deep Impreſſion of Miſery, Devaſtation and Poverty, they knowing the return of Commerce is Riches, and Plenty of all things conducing to the benefit of human Life, and fortifying their Countries with Reputation and Strength.

It was Trade that gave occaſion to the bringing of thoſe mighty Fleets to Sea, as if God had left it to them to decide by force (wherein no Age or Time can witneſs the like) the Empire of the World: Hence it was, (the advantages being found which ariſe by Commerce) that *Navigation* got its birth into the World, reducing the ſeveral Nations on the Earth by that means to be even as one Common Family; and when in this Iſle we were even in the ſtate of Canibals, it brought in a People that inſtructed us in Arts, Policies and Manners, and taught us Actions no leſs virtuous than thoſe themſelves followed: And although long and difficult it was before that mighty People could be brought over to have thoughts of the advantages ariſing from *Commerce* and *Navigation* (they only propounding to themſelves Blood, Slaughter, Conqueſt, the Riches and Spoils of Nations;) but when they entred into the *Carthaginian* War, a quarrel with a People not worth the oppoſition of a Tribune (as they thought) but finding that neither *Tribune* nor *Conſul*, no nor the Flower of the *Roman* Army was able to withſtand them, or to prevent the Invaſion of their Country, and then in the very Bowels of the ſame, put it to the Queſtion, *Rome* or *Carthage* Miſtreſs of the World; they began to conſider whence and from what cauſes thoſe unknown *Africans* ſhould withſtand the

Anno 1665. 1672, 1673.

Camden.

Quaſtus omnis indecorus patribus, ſays *Livy. lib.* 1. *Dec.* 3.

Though they had 100 roſtrated Ships, and 75 Gallies under *Cajus Duillius* and his Collegue, as *Polybius* obſerves.

the *Conſcript Fathers* and Power of *Rome*, and ſhould dare to diſpute with thoſe that had led ſo many captivated Kings in Triumph, and brought ſo many Haughty Nations to truckle under their Victorious Eagles; at laſt they found it was *Commerce* and *Navigation* that gave power and force to that mighty People: Then it was that *Rome* began to know *that Rome could not be Rome without a Naval Force*; the which and to redeem their bleeding Honour, they ſoon haſtned and equipt, great as their Competitors; afterwards *Argentum* being won, *Carthage* became no more impregnable; after which with Peace they plowed the Nighbouring Streights to *Tinges*, * *Gades*, and the *Herculean Streights*; nor could any thing be too difficult afterwards, till they arriv'd on the *Britiſh* Shore, where beholding her ample Bays, Harbours, Rivers, Shores and Stations (the Jewels and Ornaments of that Spot, and having made a Conqueſt of the ſame) they ſoon cultivated into our rude Natures the Spirit of *Commerce*, teaching and inſtructing us in thoſe polite ways that fortifie a Kingdom by Naval Force, *as the Standard and undeniable Marks of Empire*, and by aiding and teaching us in the driving on a continued and peaceable Tract of *Commerce*, we have fathom'd the unknown Depth of the *Indian* Shores, uniting, as it were, Extremes, made the Poles to kiſs each other, teaching us thereby, that it was not the vaſt Immenſities of Earth that created Empire, but Situation accompanied with *Induſtry*, *Commerce* and *Navigation*, that would enable a People to give Laws to the World: In the purſuit of whoſe Virtues, this Nation hath not been wanting, and of following their great Directions in the enlarging our Fleet; for they, when they advanced their *Eagles* on the *Britiſh* Shore, found us not then without Ships of Force, time having

* Now the important City of *Tangier*.

having not been ſo envious to this Iſland, as to eat out thoſe Records wherein mention is made * that the *Britains* accompanied the *Cymbrians* and *Gauls* in their memorable Expedition to *Greece*, long before the Incarnation of the World's Saviour; and it was from that Center that the mighty *Cæſar* firſt drew his Line, and took thoughts of plowing the Ocean to find out that Warlike People to face his Victorious Legions; when having landed, and finding a Place adorned by Nature beyond any thing that could be called great, taught us to maintain the Superiority of Dominion, that no neighbouring Nation ſhould frequent our peaceable Shores, and thoſe Merchants that came, aſſigned them places to drive their Commerce and Traffick, jealous that any Neighbouring Rival ſhould kiſs his beloved *Britannia* but a *Roman*, and for whom he fetcht ſo long and tedious a March; thus in our Infancy teaching us both Defence and Commerce. And when that mighty Empire began to decline, and thoſe remaining *Romans* began to moulter and mix among the Natives, and to become as one People again, then Sloth, Luxury and Idleneſs (the Forerunners of Ruin) invaded our Shores by a fatal ſtupidity, it ſuffered our floating Caſtles (Bulwarks of the Kingdom) to rot in their neglected Brine, and our Ports to be ſurveyed by Foreign People; which ſupine negligence ſoon ſubjected us a prey to our ambitious Neighbours, who no ſooner finiſhed their Conqueſts, and ſheath'd their devouring Swords, but each (as if inſpired by the very Genius of the place) equipt our Fleets great as their Competitors, to ſecure what they had ſo dearly won, of whom Story makes mention of the mighty *Arthur*, no leſs famous in his Warlike Atchievements, than in leading his Squadrons as far as *Iceland*, bringing thoſe *Northern* People to pay obeyſance

* *Strabo, lib.* 4.

Gauls Town near *Yarmouth* the Mart for thoſe Neighbouring Merchants.

Abrahamus Whelocbus de priſcis Anglorum legibus, written Originally by Mr. *Lambard*.

beyſance to his Victorious Standard, and acknowledge him as their Supream Lord, even from the *Britiſh*, to thee *Ruſſian* Tracts, and by him left to the famous *Edgar* *, who no ſooner found his undoubted Right, but reſolved to vindicate that Dominion which his Royal Predeceſſor had with ſo much Glory acquired, and with ſo great Care communicated and remitted down to his Succeſſor: With no leſs a number than Four hundred Sail of Ships did that mighty Prince at once cover the Neighbouring Ocean, making them the *Portcullis*, of this Iſle and the adjacent Seas, by which he vindicated his Dominions on the Waters, and gave Laws in the Chambers of his Empire: Nor did his Succeſſors *Canutus* (whom Record makes mention, that having laid that ancient Tribute, called *Dane-geld*, for the guarding of the Seas, and Sovereignty of them, was emblematically expreſt, ſitting on the Shore in his Royal Chair, while the Sea was flowing, ſpeaking, Tu Meæ ditionis es, & terra in qua ſedeo eſt, &c.) *Egbert*, *Althred*, *Ethelfred*, forget the Aſſertion of their great Predeceſſors Dominion and Sovereignty of the ſame, under no lower a ſtile, than **Supreme Lords and Governours of the Ocean ſurrounding the Britiſh Shore**, never ſo much as conteſted by any Nation whatſoever, unleſs by thoſe that attempted the Conqueſt of the entire Empire, in which that became ſubject to Fate as well as the other of the Land: Nor did the ſucceeding Princes alſo of the *Norman* Race ſtart or wave that mighty advantage in their ſucceſſive Claims, and maintaining their Right to the adjacent Sea; as appeared not long after, by that famous Accord, made between *Edward* the Firſt, and the *French* King *Philip the Fair*, calling * him to an account for Piracies committed within the *Britiſh* Seas, the Submiſſion of the *Flemings* in open

* Inſerted in *Leges Edwardi* and afterwards confirmed by the *Norman* Conqueror.

Mr. *Selden's Mare Clauſum*, *lib.* 2. *cap.* the 10. to the 16.

Matth Weſtm. *Anno* 1035. *fol.* 409.

Selden's Mare Clauſum, *lib.* 2. *cap* 11.

* *Coke* 4. *Inſt.* *fol.* 142.

open Parliament in the Second *Edward*'s Reign; and the Honour or *Duty of the Flag*, which the politick King *John* had above Four hundred Years ſince challenged by that memorable Ordinance at *Haſting* † there decreed to take place univerſally, not barely as a Civility, but as a Right, to be paid *cum debita reverentia*, and Perſons refuſing, to be aſſaulted and taken as Enemies; the ſame not only to be paid to whole Fleets bearing the Royal Standard, but to thoſe Ships of Privilege that wear the Princes Enſigns or Colours of Service: Nor was this barely a Decree written, but nobly aſſerted by a *Fleet* of no leſs than 500 Sail in a Voyage Royal of his, wherein he ſailed for *Ireland*, in his way commanding all Veſſels which he met in the Eight circumfluent Seas to pay that Duty, and Acknowledgment. Nor was the Third *Edward* ſlow in following the ſteps of his wiſe Predeceſſors when he equipt out a *Fleet* of no leſs than 700 (though on another occaſion) with 200 of which he vanquiſhed a *Fleet* of twice the number before *Calice*, to the Loſs of 30000 *French*. Nor did our Victorious Conqueror of the Sepulcher the Great *Richard*, in his Return from the *Holy-Land* want a Navy Royal to attend him home, by the force of which, he took, and deſtroyed near 100 more Ships of the *French*. And look we but into the mighty Actions of the ſucceeding Princes, we ſhall find that all thatever deſigned Empire were zealous in the Encouragement of Navigation, looking on that Axiom as undeniable, * *Qui Mare tenet, eum neceſſe eſſe rerum potiri*, and that without which the *Britiſh* Sovereignty is but an empty Title.

† *Inter Leges Marinas ſub fine anni Regni Regis Johan.* 2.

* *Cic ad. Attic l.* 10. *Ep.* 7.

Nor ought alone the Praiſes of thoſe great Monarchs, whoſe mighty care had always been to preſerve the Reputation of their Empire in their

Maritime

Maritime Preparations, to be remembered; but alſo thoſe of our inhabitants, who always have been as induſtirous to follow the Encouragement of thoſe Princes under whom they flouriſh'd, and who with no leſs Glory and timely application in Traffick, did conſtantly follow the Examples of thoſe of *Genoa*, *Portugal*, *Spaniards*, *Caſtilians*, and *Venetians*, whoſe Fame in matters of Commerce ought to be enrolled in Letters of Gold, ſince the Ages to come, as well as preſent, having been doubly obliged to their Memory, the third of which making uſe of a diſcontented Native of this Iſle, the Famous *Columbus*, who, prompted by that Genius that naturally follows a Native wiſe Man, *diſcovered* a New World, in whoſe Expedition he fathomed unknown Paths, and detected the *Antillus*, *Cuba* and *Jumaca*, &c. and the *Terra Firma* of the *American* Shore, who taking his Conjectures from the ſpiring of certain Winds from the *Weſtern* Points by wrong impulſe, accompanied with that Philoſophy he attained to, concluded ſome Continent muſt needs be hid in thoſe unknown Parts; his Service being firſt offered to his Prince, † and refuſed, he was ſoon after entertained, purely on the Faith of that noble Princeſs *Iſabella* of *Spain*, who for 17000 Crowns (for which ſhe engaged her *Jewels*) received not long after, as many Tuns of Treaſure, and to her Husband's own uſe, in Eight or Nine Years time came above Fifteen Hundred Thouſand of Silver, and Three Hundred and Sixty Tuns of Gold. Thus Ingenuity *encouraged*, though in one ſingle Perſon, hath occaſioned Wonders, and from a ſmall Kingdom (as *Spain*) it hath ſince raiſed its Head, in a condition of bringing all thoſe many Kingdoms, and vaſt Immenſities of Earth which they poſſeſs, under their Protection;

putting

Born in *England*, but reſident at *Genoa*.

† *Hen.* 7.

Campanel. Hiſt. Hiſpan.

putting them once on thoughts of no leſs than an UNIVERSAL MONARCHY: We need only mention *Sebaſtian Chabot* a Native of *Briſtol*, who diſcovered *Florida* and the Shores of *Virginia* dedicated to that Virgin Princeſs *Elizabeth*; *Thorn*, *Elliot*, *Owen*, *Gwyned*, *Hawkins*, *Cavendiſh*, *Furbiſher*, *Davis*, *Stadſon*, *Raleigh*, and the incomperable *Drake*, who was the firſt (agreed univerſally) of any Mortal to whom God vouchſafed the ſtupendious Atchievment of incompaſſing not this New World alone, but New and Old together, twice embraced by that mighty Man, who firſt making up to *Nombre de Dios*, got ſight (with Tears of Joy) of the *Southern* Seas, the which in Five Years after, he accompliſhed, paſſing through the *Magellan Streights* towards the other *Indies*, and doubling the famous Promontory, he circumnavigated the whole Earth.

Nor ought that truly worthy Captain Sir *John Narborough* be precluded from having place after the mighty *Drake*, he having not long ſince paſſed and repaſſed the *Magellan Streights*, by which that worthy Perſon hath performed that Atchievement, which was never done by any Mortal before. To reckon up the particular Actions of *John Oxenham* (a ſharer in that mighty performance of *Drake*) of his drawing his Veſſel up to Land, and covering the ſame with Boughs, paſſed the unknown Paths of Land from *Nombre de Dios* to the *South* Sea, and there building a Pinnace, enters the Iſle of *Pearls*, and from the *Spaniards* takes a Treaſure almoſt beyond credit; of the undefatigable Diligence of *Willoughby*, *Burroughs*, *Chanceler*, *Button*, *Euſſin*, *Furbiſher*, *James Middleton*, *Gilbert Cumberland*, who plowed up the *North-Eaſt* and *North-Weſt Cathaian* and *China* Paſſage; of *Jones* and *Smith*, whoſe Fortune and Courage was great in thoſe parts; of *Poole*, who found the Whale Fiſhing

ing; of Captain *Bennet* the firſt Diſcoverer of *Cherry-land*; of *Gillian* and of *Pett*, and *Jackman* that paſſed the *Vaigates*, *Scythian* Ices, and the River of *Ob*, as far as *Nova Zembla*; nor of the Famous *Davies* and *Wood*, who had penetrated to 86 Degrees of Latitude, and almoſt ſet their Feet on the *Northern* Pole, and for truly valiant the Famous *Monk*, *Blake*, *Lawſon*, *Mines*, *Sandwich*, *Oſſery*, and the never-to-be-forgotten *Spragg*, and living his Royal Highneſs *York*'s Victorious Duke, and the brave *Rupert*, Men whoſe Courage and Glorious Actions as well in Battles as in the atchieving of Diſcoveries, and pointing out to places for an immenſe Improvement in Navigation and Commerce, ought to be inrolled in the Temple of Fame as Monuments to ſucceeding Ages, of their mighty and laborious Travails and Induſtry. The Conſideration of all which give ſome ſparks of Encouragement to the Writing the enſuing Tract, eſpecially when reflecting, that among all Nations, there is a Common Law which govern the mighty thing of Navigation and Commerce; I had ſome Impulſes more than ordinary to induce me to the ſame, eſpecially at a time when Navigation and Commerce were never (from the Erection by Divine Inſtinct that mighty Prototype, the Ark to this preſent Age) in greater Eſteem than now, and by which we have found vaſt and great Eaſments and Diſcharges from thoſe Royal and juſt Rights and Dues which now and of old were juſtly due to thoſe that govern'd this Empire; therefore ought by all ways and means to be fortifyed and encouraged, be it by whatſoever Art, Science or Thing that does in the leaſt point out towards the ſame. Nor was it then wanting in Thoughts to promote and incite the Profeſſors of the Law, raiſing and ſtirring up their Genius to the advancement of the

Law

Law in this point; and though I believe many have wiſht that ſuch a thing might be, yet none that I can find have ever yet attempted the ſame: nor is it poſſible, unleſs thoſe things which are by *Law conſtituted and known*, be rightly ſeparated from thoſe that are *natural*; for natural Law is immutably and always the ſame, therefore may eaſily be collected into Art. But things that come from Conſtitution, becauſe they often vary and change, and are divers in divers Places, are put without Art, as other Precepts of Laws poſitive or municipal; hence it was that the Conſtitutions and Laws of *Rhodes*, for their Juſtice and Equity, got footing amongſt the *Romans* as well as amongſt other the bordering People on the *Mediterranean*, *Rhodiorum uſq; rerum memoriam diſciplina Navalis & gloria remanſit*; yet when they, as well as the *Romans*, becauſe ſubject to Fate, they then remained only as examples of Juſtice and Reaſon for others to imitate and follow: An obſequious Adorer of which was the great *Juſtinian*, who cauſed them to be inſerted into the Civil Law; and though they obtained a place amongſt others of the Ancient *Romans* as well as the Modern, yet have they not all receiv'd by cuſtom ſuch a force as may make them Laws, but remain only as they have the Authority in ſhew of reaſon, which binds not always alike, but varies according to circumſtances of Time, Place, State, Age, and what other conveniences or inconveniences meet with it; nor have thoſe Laws, inſtituted at *Oleron*, obtained any other or greater force than thoſe of *Rhodes* or Imperial, conſidered only from the reaſon the which are not become Laws by any particular Cuſtom

Manil. pro Orat. Leg.

And M. Serjeant *Calis* muſt be ſo underſtood of the ancient Civil and Modern *Roman* Law reduced into one, and they are not now two Laws, one Civil, and the other Imperial, but only one, that is, the Imperial. *Vide* his Reading on the Statute of Sewers, *Sect.* 1. *fol.* 31.

The Article of Enquiry annexed to them in 12 *Ed.* 3. The Inquiſition at *Quins borough*, 49 *E.* 3. *Anno* 1375. Statutes of Enquiry tranſlated by *Roughton*.

b or

or Conſtitution, but only eſteemed and valued by the reaſons found in them, and applied to the caſe emergent.

'Tis true, that in *Rome* and ſome other parts of *Italy* and *Germany*, and the Kingdom of *Portugal*, in all thoſe caſes wherein the municipal Ordinances of thoſe Countries have fail'd in providing, the Imperial Laws (if the caſe be ſuch as that it *non Tragua peccado*, or be not ſpiritual) is there made of force; but there is no other Nation, State or Republick can be named, where any part of the Body of thoſe Imperial Laws hath obtained the juſt force of a Law, otherwiſe than as Cuſtom hath particularly induced it; and where no ſuch ſetled Cuſtom hath made it a Law, there it hath force only according to the ſtrength of Reaſon and Circumſtance joyned with it, or as it Shews the Opinion and Judgment of thoſe that made it, but not at all as if it had any commanding Power of Obedience, that is, *valet pro ratione, non pro inducto jure pro ratione quantum Reges, Dynaſtæ & Reipublicæ intra poteſtatis ſuæ fines valere patiuntur*: And for *Spain* it is obſerved, *Hiſpani duplex habent, Jus, ſolum Canonicum ſcilicet & Regium*; *Civile enim* (meaning the Imperial Laws) *non habet vim Legis, ſed rationis.* And ſince this Kingdom as well as moſt others, being free from all Subjection to the Empire, having conſtituted or known Law of its own, excludes all Imperial Power and Laws, otherwiſe than as Cuſtom hath varioully made ſome admiſſion, I applied my ſelf to the Collection of ſuch matters, according to my inconſiderable Judgment, as are either conſtituted by the Supream Authority of the Three Eſtates, or that which hath in ſome meaſure obtained by continued Cuſtom the force of Law in reference to matters Maritime

Selden's Titles of Honour *lib. ult. cap. ult.*

ritime and of Commerce, as well in Caſes publick as private.

By the firſt part of which I thought it neceſſary, ſince nature by Traffick hath made us all Kinſmen, to conſider and examine upon what Grounds, and in what manner *Commerce* was firſt procured and eſtabliſhed, which is by the Laws of Leagues, Embaſſies, and the like, which is a thing fit to be known; ſo likewiſe of what may interrupt the ſame, and likewiſe of thoſe that have any reference to Seafaring Cauſes in Matters Civil.

In the proſecution of this Work, I have taken care to refer thoſe things, which pertain to the *Laws of Nature*, unto Notions ſo certain, that no Man, without offering of Violence to himſelf, may deny them; and to aſcertain the Truth of ſuch, I have uſed the Teſtimonies of ſuch Authority (as in my weak Judgment are of Credit to evince the ſame;) and as to that Law, which we call the Law of Will, or Common Conſent, or the Law of Nations, for that which cannot by ſure conſequence be deduced out of ſure Principles, and yet appears every where obſerved, muſt needs have its riſe from free Will and conſent, which is that which is called the *Law of Nations*; both which (as much as poſſible) hath been endeavoured to be kept aſunder where the matter hath required it. And for the Civil Law, I have aſcertained the ſeveral Authorities which I have made uſe of, that is, of the *Romans*, into three ſorts, the *Pandects*, the *Code* of *Theodoſius* and *Juſtinian*, the *Novel Conſtitutions*, and theſe moſt excellent *Juriſconſults* that have by their profoundneſs of Judgment illuſtrated the obſcure Paths of the ſame Law; the third thoſe moſt excellent Perſons who joyned Policy to Law, as *Grotius*,

tius, *Raleigh*, *Bacon*, *Selden*, and the like. Of other Pieces, that of *Shardius*, Entituled, *Leges Navales Rhodiorum & ſelectæ Rhodiorum*, *Petrus Pekius*, the *Zealander*, *Locinius*, *Vinius*, that of *Oleron* collected by *Garaſias* alias *Ferrand*, and *Cleriack*.

As to thoſe Matters that have paſſed the Pikes at the *Common Law*, I have as carefully as poſſible referred to their ſeveral Authorities. In the whole Work I have no where medled with the *Admiralty* or its Juriſdiction (unleſs by the by, as incidently falling in with other Matters) knowing well that it would have been impertinent and ſawcy in me to enter into the debate of *Imperium merum*, *Imperium mixtum*, *Juriſdictio ſimplex*, and the like, and of the bounding out of Juriſdictions, which in effect tends to queſtion the Government, and trip up the Power that gives Laws and Protection to us, ſince all that can be ſaid, as well on the one Side as the other, hath been ſo fully and learnedly handled and treated of by ſeveral worthy Perſons, (that have indeed ſaid all that can be ſaid) but more eſpecially in that Famous Diſpute not long ſince before His Sacred Majeſty in Council, where all the moſt Elaborate and Ingenious Reaſons that could be drawn by the Skill of a Learned Civilian, were there aſſerted in vindicating the Admiralties Juriſdiction, by the Judge of the ſame, Sir *Leoline Jenkens*, in anſwer of whom was produced that *Great Good Man* the Lord Chief Juſtice *Hales*, who as well by Law poſitive as other his great Reaſons, ſoon put a Period to that Queſtion, which during his Days ſlept, and it may modeſtly be preſumed will hardly (if ever) be awaked.

It is called *Imperium*, becauſe it proceeds from the Authority of the Judge, and not from any right inherent in the party.

Leg. 1. §. *de Conſt. Princip.* Coke *lib.* 10. *fol.* 73. *in le Caſe del Marſhalſea.*

He

He that hath never ſo little to do with the Compaſs, though he ſits ſtill in his place, does as much or more than all the other neceſſary noiſe in the Ship; the compariſon is quit of Arrogance, *for it* holdeth in the Deſign, it is not meant of the *Performance*.

And though I well know, That thoſe that ſpend their time in brewing of Books, are by *Seneca* compared to petty Painters, that buſie themſelves in copying out Originals, having this half Verſe of *Horace* often thrown in their Teeth,

——O imitatores ſervum pecus!

Yet I have this Hope left, That my Faults and Flaws, like thoſe found in the Cuts of Diamonds, may at this time the eaſier eſcape under the excellency of their Subject, or at leaſt under that of your Charity.

Charles Molloy.

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Chap. I.

Of Dominion or Property in general, and of the Cauſes changing the ſame by War.

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XXIV. *Of the Goods of Friends that ſupply an Enemy, whether ſubject to be made Prize by the Laws of Nations.*
XXV. *How dealt withal after ſeiſure, by the Practice of ancient and Modern Ages.*
XXVI. *Whether lawful for a Chriſtian to aſſiſt an Infidel againſt a Chriſtian by the Laws of Nations, and by our Religion.*

I. NO ſooner had the Eternal Power created Man, but he beſtowed on him a Right over the things of this inferiour Nature; nor was his goodneſs leſſened upon the

Juſtin, lib. 43. Reparation of the World after the Flood (*all things being then undivided and common to all, as if all had one Patrimony*) ſince every Man might then take to his uſe what he pleaſed, and make conſumption of what he thought good in his own Eyes; which uſe of the univerſal Right was then inſtead of Property: for what any one had ſo taken, another could not without Injury take away from him.

A Theatre is common, yet the place poſſeſſed by any one, may be rightly called his own.

II. Nor was it impoſſible for that State to have continued, if Men through *great ſimplicity* or *mutual charity* had lived together, and this is inſtanced in thoſe *Americans*, who through many Ages have lived in that community and cuſtom, and the other of *Charity*, which the *Eſſens* of old practiſed, and then the *Chriſtians* who were firſt at *Hieruſalem*, and at this day not a few that lead an aſcetick Life; the ſimplicity of our firſt Parents was demonſtrated by their nakedneſs, there being in them rather an *ignorance of Vice, than a knowledge of Vertue*, their only Buſineſs being the Worſhip of God, living eaſily on thoſe things, which the Earth of her own accord brought forth without labour.

Juſtin lib. 2. *ut de Scythis loquitur Trogus. Primum inter Homines mali neſcio & adhuc aſtutiæ inexperta ſimplicitas.*

III. Yet in this ſimple and innocent way of Life, all men perſiſted not, but ſome apply'd their Minds to various *Arts*; the moſt ancient of which was *Agriculture* and *Paſture*, appearing in the *firſt Brothers*, not without ſome diſtribution of Eſtates, and then from the diverſity of each Man's Actions aroſe *Emulation*, and then *ſlaughter*; and at length, when the good were infected with the bad, a *Gigantick kind of Life*, that is, *violent*; but the World being waſhed by the *Flood*, inſtead of that fierce Life, ſucceeded the deſire of *Pleaſure*, whereunto *Wine* was ſubſervient; and thence aroſe *unlawful Loves*, but by *that more generous vice Ambition*, Concord was chiefly broken, after which Men parted aſunder, and ſeverally poſſeſs'd ſeveral parts of the Earth; yet afterwards, there remain'd amongſt Neighbours a communion not of Cattle, but of Paſtures, becauſe in the ſmall number of Men, ſo great was the Latitude of Land, that without any incommodity it might ſuffice to the uſes of many, until the number of Men, ſo of Cattle encreaſed, Lands every where began to be divided; not among Nations as before, but among Families; an inſtance of which we have hourly before our Eyes in thoſe vaſt immenſities that are daily appropriating

Seneca Naturalium. 3. *in fine.*

Ne ſignare quidem aut partire limite campos Fas erat.

priating and planting in *America*, from hence we learn what was the cauſe for which Men departed from the primitive communion of things, firſt of *moveables*, and then of *immoveables* alſo; to wit, becauſe when not content to *feed* upon that which grew of it ſelf, and the Earth ſingly brought forth, to dwell in *Caves, to go naked, or clad with rinds of Trees, or skins of Beaſts*; they had choſen a more exquiſite kind of Life, there was need of Induſtry, and uſing of Art in thoſe matters, which they ſhould give themſelves up to; ſo likewiſe from hence we learn, that Men not content to live in that innocent ſtate of community, how things went into Property, not only by the act of the Mind (for they could not know the thoughts of one another, what every one would have to be his own, that they might abſtain from it, and many might deſire the ſame thing) but by a certain *Covenant*; either *expreſs* as by diviſion, or *tacit* as by *occupation*, for ſo ſoon as Communion did not pleaſe them, and diviſion was not made, it ought to be ſuppoſed an agreement amongſt all, that every one ſhould have proper to himſelf what he ſeized on, * *for every one might prefer himſelf before another, in getting thoſe things uſeful for the accommodating of Human Life, Nature not being repugnant to the ſame.*

Bodin. lib. 3. *cap.* 7.

Grotius de Mari libero cap. 13.

* *Cic. offic.* 11 *Addendum illud Quintiliani; Si hæc conditio eſt, ut quicquid in uſum hominis ceſſit, proprium ſit habentis, profecto quicquid jure poſſidetur, injuria aufertur. Macrobius Saturn. l.* 3. *c.* 12.

IV. And though Property may ſeem to have ſwallow'd up all that right which aroſe from the common ſtate of things, yet that is not ſo; for in *the Law of Dominion, extream neceſſities* ſeem excepted. Hence it is that in Navigation, if at any time Victuals fail, what every one hath, ought to be brought forth for the common uſe: and ſo in a Fire, I may pull down or blow up my Neighbour's Houſe to ſave mine; deſtroy the Suburbs, to raiſe Lines or Forts to preſerve the City thereby; dig in any Man's Grounds for Salt Peter, cut in pieces the Tackling or Nets upon which my Ship is driven, if it cannot be diſintangled by other means: all which are not introduced neither by the *Civil Law*, nor the *Municipal Laws* of Countries, but are expounded by them, with their proper diverſities.

Leg. 2. §. *item in eadem D. ad Leg. Rhodani. Quo non fragm.* §. *Quod ait. D. incend. Leg. Quemadmodum* §. *item. D. ad l. Aquilam.*

12. *Ed.* 3. *tit. diſtreſſ.* 170. 11 *H.* 7. 5. Reniger & Fogaſſas, Plowden *fol.* 1. *to the* 10. Coke 3 *Inſtit. fol.* 83.

V. Nor is Property ſo far inſtated in Man, but the ſame may again be diveſted by ſuch means as ſtand with the Law of *Nature* and *Nations*; and firſt by War, the Cauſes of which are aſſigned to be three, *Defence*, *Recovery*, and *Revenge*.

Bald. lib. 3. *de rerum diverſarum*, ſeems to have been of opinion, that by the Laws of Nations one may take Arms to abate the growing Power of his Neighbours. *Sed ut vim pati poſſe ad vim inferendam Jus tribuat, ab omni æquitatis ratione abhorret*: But that a poſſibility of ſuffering Force, ſhould give a right of offering of Force, this is far from all equity, ſays the excellent *Grotius lib.* 2. *cap.* 1. *ſect.* 27. Sir *Walter Raleigh* in Hiſt. of the World, cap. of Duels *fol.* 550. *Grot. de jure belli & pacis* 3. *c.* 6. *Sect.* 11, 12, 13, 14.

But then ſuch War muſt be juſt, and he that undertakes it muſt be a *Sovereign*: the juſt cauſes to make a War are our *Prince*'s or *Country*'s defence, and that of our Allies, the Satisfaction of our Injuries, or theirs; our juſt Pretenſions to an Eſtate or Right; Divines have added another, not only the Defence of Religion, but its Advancement and Propagation, by the way of Arms, and ſome the extirpation and rooting up a contrary. Certainly War is too rough a Hand, too bad a Means, to plant Piety; *Sicut non Martyrem pœna, ſic nec fortem pugna, ſed cauſa; As it is not the puniſhment that makes the Martyr, ſo it is not fighting that declares a valiant Man, but fighting in a juſt cauſe*; in which whoſo ſhall reſolvedly end his Life valiantly, in reſpect of the cauſe, that is, in the Defence of his Prince, Religion, or Country, *ought to be numbred amongſt the Martyrs of God.*

VI. Publick War is either *Solemn* by the Laws of Nations, or elſe leſs *Solemn*. What we here call Solemn is commonly call'd Juſt, in the ſame ſenſe as a juſt Teſtament is oppoſed to *Codicils*, not that it is not lawful for him that pleaſes to make Codicils, but becauſe a Solemn Teſtament hath by the Civil Law ſome peculiar effects; and this difference is worth Obſervation, ſeeing many miſunderſtanding the Word *Juſt* conceive all Wars to be condemn'd as unjuſt and unlawful, whereunto this Appellation of Juſt is not agreeable.

Ita inter cives erant quædam matrimonia non juſta, non juſti liberi. Paul. Sent. lib. 2. *tit.* 19.

VII. That War, according to the Law of Nations, may be Solemn, two things are requiſite: Firſt, That it be waged on both ſides by his Authority who hath the higheſt Power in the Commonwealth. Secondly, That certain Rights be uſed (of which we ſhall ſpeak in due place) one of

of theſe without the other (becauſe they are both required) doth not ſuffice. Publick War leſs Solemn may want thoſe Rites, and be waged againſt private Perſons, and have for the Author any Magiſtrate. And according to the opinion of moſt Civilians, if the matter be conſidered without Civil Laws, it ſeemeth that every Magiſtrate hath right to wage War, as for the defence of the People committed to his Charge, ſo for the Exerciſe of Juriſdiction, if he be oppoſed by Force: But becauſe by War the whole Commonwealth is endangered; therefore by the Laws of all Nations that War be not undertaken without the Authority of him whoſe Power in the Commonwealth is the higheſt, there is extant ſuch a Law of *Plato's*; and in the Roman Law it is called Treaſon in him who, without the Command of the Prince, hath waged War, or liſted Soldiers, or raiſed an Army; in the *Cornelian* Law brought in by *L. Cornelius Sylla* it was, *without the Command of the People*; in *Juſtinian's* Code is extant a Conſtitution of *Valentinian* and *Valens*, *None have leave to take any Arms without our knowledge and direction.* And my Lord *Coke* in his Third Inſtitutes obſerves, That by the Common Law of this Realm it was High-Treaſon to levy a War without Authority from the King, for to him it belongeth only. And the reaſon why it ſhould be ſo ſubjected is, becauſe that natural Order for preſerving of peace among Men requires that an Authority and Council in undertaking of War ſhould remain in Princes.

Ult. de Leg. l. 3. D. ad leg. Jul. maj.

Fol. 9 Le Roy doit de droit ſaver & defender ſon Realm vers Enemies, &c.

Fitz. Herb. Nat. Bre. fo. 113. a

VIII. But as all Laws muſt be interpreted by Equity, ſo muſt this Law; and therefore there is no Queſtion but that 'tis lawful for one having Juriſdiction by force of thoſe which we call a peaceable Guard or Power, *viz.* Conſtable, Serjeants, Watch men, *&c*, to conſtrain a few diſobedient Perſons as oft as there's no need of greater Power to that purpoſe, and no eminent danger to the Commonwealth. Again, if it be ſo preſent a danger, that time will not admit of Conſultation with him who hath Supreme Power, here alſo neceſſity affordeth another Exception; and therefore in Garriſons, if the Townſmen ſhould endeavour to fall over to an Enemy, they may be dealt withal as Enemies by the Governour of the Garriſon, and by that Right *L. Pinarius* Governour of *Enna*, a Garriſon in *Sicily*, having information that the Townſmen were falling

off to the *Carthaginians*, making ſlaughter of them kept the Town: and the reaſon why ſuch extraordinary Force is called War, is, for that the ſame is commenced by the right of the Magiſtrate, in which caſe the War is ſuppos'd to be made by the higheſt Power, becauſe every one is judged Author of that which he giveth another Commiſſion to do; beſides the univerſal reaſon which warrants the act, which requires that all Dangers, Rebellions, and Inſurrections be withſtood and checkt in the very bud, and tho' this is called War, yet this ſtrictly is not properly War, tho' the Parties who ſuppreſs or puniſh are impune.

IX. But War properly by the Laws of this Realm or *Solemn*, is, when the Courts of Juſtice are ſhut up, and the Judges and Miniſters of the ſame cannot protect Men from violence, nor diſtribute Juſtice: ſo when by *Invaſion*, *Inſurrection*, *Rebellion*, or the like, the current of Juſtice is ſtopt and ſhut up, *Et ſilent leges inter arma*, then it is ſaid to be time of War, and the Trial of this is by Records and Judges of the Court of Juſtice, and not by a Jury. So likewiſe War by the Laws of *England* is when the King's Standard and Hoſt enter the Realm of another Prince or State, and hath been there by the ſpace of Forty Days, for till then the War is not properly ſaid begun.

14 *Ed.* 3. *tit. Scire facias* 122, *inter Mortimer* and the Earl of *Lancaſter*.

Trin. 7 *Ed.* 3. *fol.* 29.

Grot. de jure belli et pa. lib. 2. *c.* 1. §. 2.

X. Wars, though undertaken by publick Authority, muſt have the Effects of Law, that is, there muſt be a juſt cauſe for the undertaking the ſame; ſo that *Alexander*, if that without cauſe he warred upon the *Perſians* and other Nations, is by the *Scythians* in *Curtius* and by *Seneca* too deſervedly called a Robber. For take away Juſtice, and what are Kingdoms but great Robberies? Therefore the juſt cauſe of taking Arms muſt be the Iniquity, or as we underſtand it, the Injury of the adverſe Party, according to the Words uſed in the ancient Denunciation of the Roman Heralds, * *I call you to witneſs, that People is unjuſt, and doth not perform what is Right.* Now that is unjuſt which hath a neceſſary repugnance to the rational and ſocial nature. Now amongſt the firſt principles of Nature there is nothing neceſſarily repugnant to War, there is much in favour of it; for both the end of War, the conſervation of Life and Members, and the keeping or acquiring of things uſeful unto Life is moſt agreeable unto thoſe Principles; and if need be, to uſe Force to that purpoſe

Seneca de benefic. 1. *c.* 13.

* *Ego vos teſtor, Populum illum injuſtum eſſe, neque jus perſolvere.*

purpoſe is not diſagreeable, ſince every thing hath by the Gift of Nature ſtrength, to the end it may be able to defend and help it ſelf, and therefore *he is by Nature fitted for Peace and War; though coming into the World unarmed, yet he hath a Hand fit to provide and handle Arms*, the which we daily ſee Children of their own accord, without a Teacher, make uſe of for a Weapon. Moreover right Reaſon and the Nature of Society inhibits not all Force, but what is repugnant to Society, that is, which depriveth another of his Right; for the end of Society is, that by mutual Aid every one may enjoy his own. And this were ſo, although the Dominion and Propriety of Poſſeſſions had not been introduced; for life, members, liberty would yet be proper to every one, and therefore could not without Injury be invaded by another, and to make uſe of what is common, and to ſpend as much as may ſuffice Nature, would be the right of the occupant, which right none without Injury could take away: and that is made evident, ſince by Law and Uſe Dominion is eſtabliſh'd, and that appears by the Orator, *Ut ſi unumquodque membrum ſenſum ſuum haberet, ut poſſe putaret ſe valere ſi proximi membri valetudinem ad ſe traduxiſſet, debilitari & interire totum corpus neceſſe eſt*: and applying that, ſays, *So if every one of us ſnatch unto himſelf the commodities of other Men, and draw away from every one what he can to advantage himſelf, humane Society cannot ſtand, Nature gives leave to every Man, in the acquiſition of things uſeful, to ſupply himſelf before another: But by the Spoils of another to increaſe his own Store, that Nature doth not permit.* It is not then againſt Society to provide for one's ſelf, ſo that another's right be not diminiſhed; nor is that violence unjuſt which doth not violate the Right of another. Of the two kinds, Contention by debate and by force, the one agreeing to Men, the other more becoming Beaſts, we muſt fly unto the latter when the former will not ſerve. The incomparable *Ulpian* ſays, *Caſſius writes that it is by Nature lawful to repel Force by Force, and Arms by Arms.* And this is further proved out of Sacred Hiſtory; for when *Abraham* having armed his Servants and Friends, purſued the Four Kings that ſpoil'd *Sodom*, and returned with Victory and Spoil of the Enemy, God by his Prieſt *Melchiſedeck* approved his Action, *Bleſſed be the moſt High God*, ſaid *Melchiſedeck, who hath delivered thine Enemies into thine Hand.*

Tully's Offic. 3.

Leg. 1. *ſect. vim vi. D. de vi. & vi. arma. a.*

Gen. 14. 18.

Abraham, as appears by the Story, had taken Arms without any ſpecial Commiſſion from God; therefore the Law of Nature was his Warrant, whoſe Wiſdom was no leſs eminent than his Sanctity; nay, God himſelf hath preſcribed to his People general and perpetual Laws of waging War, thereby ſhewing that Wars may be Juſt, even without his ſpecial Mandate; for he doth plainly diſtinguiſh the Cauſe of the ſeven Nations (in which God gave a ſpecial Mandate for the deſtroying of them, which is properly called the Wars of God, and not of humane Counſel) from the cauſe of other People, and preſcribing nothing about the juſt Cauſes of entring into War, thereby ſhews them to be manifeſt enough by the Light of Nature, as the cauſe of the defending of the Frontiers in the Wars of *Jephtha* againſt the *Ammonites*, and the cauſe of Ambaſſadors violated in the Wars of *David* againſt the ſame.

XIII. By the Law of Nature in War thoſe things are acquired to us, which are either equal to that, which being due unto us, we cannot otherwiſe obtain, or elſe is ſuch a mark as does infer Damage to the guilty Party by a fit meaſure of Puniſhment; and by the Laws of Nations, not only he that wages War on a juſt Cauſe, but every one in ſolemn War, and without end and meaſure, is Maſter of all he taketh from the Enemy in that Senſe, that by all Nations, both himſelf and they that have Title from him, are to be maintained in the Poſſeſſion of them; which as to external Effect we may call Dominion; *Cyrus* in *Xenophon*, *it is an everlaſting Law among Men, that the Enemies City being taken, their Goods and Money ſhould be the Conquerors*; for the Law in that matter is as a common Agreement, whereby the things taken in War become the Takers. From the Enemy are judged to be taken away thoſe things alſo which are taken away from the Subjects of the Enemy, and Goods ſo taken cannot by the *Law of Nations* be properly ſaid taken; but when the ſame are *out of all probable hopes of recovery*, that is, as *Pomponius* obſerves, *brought within the bounds or guards of the Enemy*; For ſays he, *ſuch is a Perſon taken in War, whom the Enemies have taken out of our, and brought within their Guards, for till then he remains a Citizen.* And as the Law of Nations is the ſame reaſon of a Man, ſo likewiſe of a thing; and therefore Goods and Merchandize

Xenoph. 5. de Inſtit. Cyri. Ariſt 1. Polit.

Hujuſmodi res non tam capta quam recepta intelligitur, per. D. per Pomponius & Leg in Bello Parag. Si quis ſervum in pr. de capt. & poſt.

dize are properly ſaid to be the Captors, when they are carried *Infra Præſidia* of that Prince or State, by whoſe Subjects the ſame were taken, or *into the Fleet, or into a Haven, or ſome other place where the Navy of the Enemy rides:* For then it is that the recovery ſeems to be paſt all hope. And therefore the *common Law* of this Realm calls ſuch a taking a *Legalis Captio in Jure Belli*, and in 7 R. 2. an Action of Treſpaſs was brought for a Ship, and certain Merchandize taken away, the Defendant pleaded that he did take them in le haut Mere ou les Homms queux ſont Enemies le Roy; and it was adjudged that the ſame Plea was good. And, in the Year 1610. a Merchant had a Ship and Merchandize taken by a *Spaniard*, being an Enemy; a Month after a Merchant Man, with a *Ship* called *The little Richard*, retakes her from the *Spaniard*: It was adjudged, that ſuch a poſſeſſion of the Enemy, diveſted the Owner of his Intereſt, and the retaking afterwards in *Battel*, gained the Captors a Property.

2 R. 3. *fol.* 3. 7 R. 2. Treſpaſs *Statham Pl.* 54.

M. 8. *Jac. in* B. R. *Brownlow* 2 *part in Weſtons* C. 11. 7. *Ed.* 4. 14. *a.* 24. *Ed.* 3. 16, 17.

XIII. 'Tis true, the Civilians do hold, That it is not every Poſſeſſion that qualifies ſuch a Caption, and makes it become the Captor's; but a firm poſſeſſion (that is) when the Prize doth *pernoctare* with the Enemy, or remain in his poſſeſſion by the ſpace of 24 Hours; but as this is a new * Law, ſo it is conceived to be againſt the ancient Judgments of the Civil Law, as well as the modern Practice of the common Law: for the Party in the ancient Precedents doth not mention by their Plea, that the Prize did *pernoctare* with the Enemy, but general, that the ſame was gained by Battel of the Enemy.

* *Conſulatu Maris c.* 283. 287. *Conſtit. Gallicæ lib.* 20. *tit.* 13. *art.* 24.

7 R. 2. Treſpaſs *Statham Pl.* 54.

XIV. This right of changing of Dominion or Property by force of Arms, is ſo odious, that in the taking of Goods, if by any poſſibility the right Owners may have reſtitution, the ſame hath been done. And although a larger time than 24 hours happens between the capture and recapture, and ſo may *pernoctare* with the Captor, yet reſtitution may be made; and therefore if one Enemy takes the Ship and Merchandize of another Enemy, and brings her into the Ports or Havens of a *Neuter Nation*, the Owners may ſeize her, and the *Admiral* of that *Neuter Nation* may in ſome caſes reſtore the Ship and Goods to their Owners, and the Perſons captive to their former liberty;

the

the reaſon is, for that the ſame ought to have been brought *infra Præſidia* (a) of that Prince or State by whoſe Subject ſhe was taken.

A *Dunkirker* having ſeiz'd a *Frenchman*'s Veſſel, *ſuper altum Mare*, ſold the ſame with her lading at *Weymonth*; whither it had been driven before ſhe was brought *infra Præſid. Dom. Reg. Hiſpaniæ*: The *Frenchman* coming into Port, there claims the benefit of the Laws of Nations, the King of *England* being then in amity with both their Princes, and that reſtitution be made; in which caſe it was reſolved by all the Judges (b) That if there be a Caption by Letters of *Marq*, or by *Piracy*, and the Veſſel and Goods are not brought *infra Præſidia* of that Prince or State, by whoſe Subject the ſame was taken, the ſame will not diveſt the Property out of the Owner; with this agrees the Law Civil, and reſtitution may be made. For this is not an abſolute property immediately veſted in the Captor upon the taking; but a conditional property to anſwer the original Debt or Damage, which cannot be done without a judicial Adjudication, the opportunity of which he hath loſt by bringing the Prize into the Country of another Prince: for as to private War, their Countries are as an Aſylum.

(a) *Res quæ intra præſidia perductæ nondum ſunt, quanquam ab hoſtibus occupatæ, Dominum non mutârunt ex Gentium jure.* *Grotius de jure Belli ac Pacis, l. 3. c. 9. §. 16.*

(b) *Trin. 17. Car.* i. *in* B. R. March's Reports 110.

Per leg. libertas, & de leg. Jur.

XV. But if the Ships of War of Nations in enmity meet at Sea, and there be a caption, if there be that which is called *a firm poſſeſſion*, the *Neuter Nation* cannot re-deliver or make reſtitution of the thing ſo acquired; and ſo it was adjudged, where *Samuel Pellagii* with a Ship of War of the Emperor of *Morocco*, took a *Spaniſh* Ship, and brought the ſame into *England*, that he could no ways be queſtioned for the ſame *criminaliter*, or reſtitution to be made *civiliter*; for that the King of *Spain* and the *Morocco* Emperor were Enemies, and the King of *England* in Amity with both, and that ſuch a caption is not called *Spoliatio, ſed legalis captio*, in which there can be no reſtitution made, upon neither of the Statutes of 31 *H. 6. cap.* 4. or 27 *Ed.* 3. *cap.* 13. for he that will ſue to have reſtitution in *England* for Goods taken at Sea, muſt prove, *That the Sovereign of the Party was in amity with the King of* England. Secondly, *That he that took the Goods, his Prince was at the time of the taking in amity with the Sovereign of him whoſe Goods were taken.* For if he which took them,

3 Ro. Rep. 175. *Bulſtrod.* 3. *part. fol.* 28. cited *in* Caſe.

The getting of Letters of Repriſal againſt a Nation, does not make a War between both States; nor can they be ſaid to be at Enmity.

22 *E.* 3. *fol.* 13. *Coram Rege & Concilio ſuo in*

them, was in enmity with the Sovereign of him whoſe Goods were taken, then the ſame will not amount unto a depredation or robbery, but a lawful taking, as every Enemy might take of another. *Camera Stellarum Michaelis 2 R 3. fol. 2. A.*

A *Spaniſh* Merchant, before the King and his Council, *in Camera Scaccarii*, brought a Bill againſt divers *Engliſhmen*, wherein ſetting forth *quod depraddatus & ſpoliatus fuit*, upon the Sea, *juxta partes Britanniæ per quendam Virum Bellicoſum de Britannia, de quadam Navi*, and of divers Merchandizes therein, which were brought into *England*, and came into the hands of divers *Engliſhmen*, naming them, and ſo prayed proceſs againſt them, who came in, and pleaded, that in regard this depredation was done by a Stranger, and not by the Subjects of the King of *England*, they ought not to anſwer. It was there reſolved, *Quod quiſquis extraneus*, who brings his *Bill* upon this Statute to have reſtitution, *debet probare quod tempore captionis fuit de amicitia Domini Regis*; and alſo, *quod ipſe qui eum ceperit, & ſpoliavit, fuit etiam ſub obedientia Regis, vel de amicitia Domini Regis, ſive Principis querentis, tempore ſpoliationis, & non Inimicus Domini Regis, ſive Principis querentis; quia ſi fuerit inimicus, & ſic ceperit bona, tunc non fuit ſpoliatio, nec deprædatio, ſed legalis captio, prout quilibet inimicus capit ſuper unum & alterum.* 7 E. 4. 14. 13 E. 4. 9. 22 E. 3. fol. 23. 2 R. 3 fol. 2. 27 E. 3. c. 13. 31 H. 6. c 4. 3 Bul. 28. 1 Ro. Rep. 175.

But if the King of *England* is in enmity with the *States of Holland*, and one of their *Ships of War* takes a Merchant-Man of the King of *England*'s, and afterwards another *Ship of War* of *England* meets the *Dutchman* and his prize, and in *aperto prælio*, regains the prize, there reſtitution is commonly made, the Owners paying the *Salvage*: ſo where the prize is recovered by a *Friend in amity*, or comes into his *Ports*, reſtitution is likewiſe made; but when ſuch Goods become a lawful and juſt prize to the Captor, then ſhould the *Admiral* have a tenth part; following the religious example of *Abraham*, after his Victory over the five *Kings*. *Hujuſmodi res non tam capta, quàm recepta intelligitur: per D. Leg. Pomponius. & per Leg. in Bello Par. ſi quis ſervum in pr. de Cap. & poſt.* *Per Leg. poſtliminio, Par. Poſtliminio. de Capt, & poſtl.*

Boyes & Cole, verſ. Claxton, Hill. 26, & 27 Car. 2. in B. R. Reſtitution made formerly by a *French-Man*, who had regained an *Engliſh* prize out of the Hands of a *Dutch* Man of War.

XVI. He that is an Enemy, may every where be aſſaulted, according to the Laws of Nations. Enemies may

may therefore be attacked or ſlain on our Ground, or our Enemies, or on the Sea; but to aſſault, kill, or ſpoil him in a *Haven* or *peaceable Port*, is not lawful; but that proceeds not from their Perſons, but from his right that hath *Empire* there, for Civil Societies have provided that no force be uſed in their Countries againſt Men, but that of Law, and where that is open, the right of hurting ceaſeth. The *Carthaginian Fleet* was at Anchor, in *Syphax* Port, who at that time was at peace with the *Romans* and *Carthaginians*; *Scipio* unawares fell into the ſame Haven, the *Carthaginian Fleet* being the ſtronger, might eaſily have deſtroyed the *Romans*; but yet they durſt not fight them. The like did the *Venetian*, who hindred the *Greeks* from aſſaulting the *Turkiſh Fleet*, who rid at Anchor in a Haven, then under the Government of that *Republick*; ſo when the *Venetian* and *Turkiſh Fleet* met at *Tunis*, though that very Port acknowledges the *Ottoman* Emperour; yet in regard they are in the nature of a *Free Port* to themſelves, and thoſe that come there, they would provide for the peace of the ſame, and interdicted any Hoſtile Attempt to be made there.

Sir *Walter Raliegh l.* 5. *c.* 3. S. 17.

The *Corſaires* having been in the *Gulph*, put into the Port of *Vallona*, which is ſubject to the Turk: whereupon *Capello*, Proveditor-General for the *Venetian*, and Captain of the Gulph, having notice of the ſame, made into the Port; and though the *Ottoman Port* had by Treaty permitted the *Venetian* to purſue the Pirates in all Places, and forbad their Commanders to protect or ſhew them any Favour, yet the Caſtle interdicted, and forbad the *Venetian* General with Cannon to attack them; for it was neverthele ſs intended by the Treaty that the Peace of Ports muſt be preſerved.

Hiſtory of the Repulick of *Venice* in *Anno* 1638. and *fol.* 447.

And the ſame Republick having War with thoſe of *Genoa*, met at *Tyre*, *Reinerius Zenus* Duke of *Venice* with the united power of the *Venetians* and *Piſans*, counting no fewer Number than 74 Veſſels well provided, and would have engaged in the very Haven, but were there interdicted by the Governour; but yet with this Proviſo, that if by conſent they would go out of the Protection of the Port, and at open Sea decide the cauſe, they had then freedom: And accordingly they ſailed forth and ingaged. The like not long ſince happened be-

Fuller's Holy War, *l.* 4. *c.* 23.

between *Cornelius de Wit* Commander of a Ship of War of the *States General*, and Captain *Harman*, Commander of one of His Majeſty's Frigates at *Cales*, a Challenge being made in that Port by the firſt, and as briskly accepted by the latter, but both were interdicted the execution of the ſame in the Port, but out of the protection of the ſame they might decide the Queſtion; the which they did to the no ſmall Fame of the laſt; for in that diſpute, of 380 Men then aboard the *States* Man of War there were ſcarce 100 whole Men in her, and *Harman* having entred and taken her, brought her at his Stern in Triumph to the Port again. *Jun. An. 1671.*

But they of *Hamborough* were not ſo kind to the *Engliſh*, when the *Dutch Fleet* fell into their Road, where rid at the ſame time ſome *Engliſh* Merchant Men, whom they aſſaulted, took, burnt and ſpoil'd; for which Action, and not preſerving the Peace of their Port, they were by the *Law of Nations* adjudged to anſwer the damage, and I think have paid moſt or all of it ſince. But Enemies in their own *Ports* may be aſſaulted, burnt or deſtroyed by the Laws of Arms. *Anno 1665, 1666. Bell. Angl. cum Batav.* This is *Jus belli, & in Republica maxime conſervanda ſunt Jura Belli. Reg. fol 129. Arreſt fact ſuper bonis Mercator, alienig.*

XVII. If the Ships of any Nation happen to arrive in any of the King of *England*'s Ports, and afterwards, and before their departure a War breaks out, they may be ſecured, priviledged without harm of Body or Goods; but under this limitation, till it be known to the King, how the Prince or Republick of thoſe, whoſe Subjects the Parties are, have *uſed and treated thoſe of our Nation in their Ports.* But if any ſhould be ſo bold as to viſit our Ports after a War is begun, they are to be dealt with as Enemies. *Grot. de Jure belli & pacis lib. 3. c. 11. Sect. 12.* Some of old haveheld that *Clericus, Agricola & Mercator tempore belli ut colat commutet, oretq; pace fruuntur* Co. 2. Inſtit. *fol. 58.*

XVIII. By the Laws of Nations generally all things are the Captor's which he takes from his Enemy, or which his Enemies gained from another by Force of Arms; ſo likewiſe all thoſe Goods that he ſhall find in his Enemies cuſtody: but then it muſt be apparently manifeſt, and evidently proved, that it is really the Enemies; for if an *Engliſh-Man* ſhould have Goods in the cuſtody of a *Dutch Factor* at *Cales*, and a War ſhould break

break out between that *Prince* and that *Republick*, yet are not the Goods of the *Engliſh-Man* ſubject to the ſeiſure of the *Spaniard*, it being apparent, that the owner is not a Subject of their Enemies; So likewiſe if the Goods of *Friends* are found in the Ships of *Enemies*, this does not *ipſo facto* ſubject the ſame to be *prize* by the Laws of Nations; though it be a violent preſumption, and may juſtly bear a legal examination, till which there may be a ſecuring of the prize, till adjudication ſhall paſs. So on the other hand, if the Ships of *Friends* ſhall be freighted out to carry the Goods of *Enemies*, this may ſubject them to be *prize*, eſpecially if the Goods ſhall be laden aboard *by the conſent or privity of the Maſter or Skipper*; though in *France* they have ſubjected and involved the innocent with the nocent, and made both of them *prize*. In the late *Flemiſh* Wars with *England* the *Oſtenders* became obſequious ſerviceable with their Ships to the Traffick and Commerce of both Nations. Memorable was the Action, when the War was between the two Republicks, *Venice* and *Genoa*, the *Grecian* Ships being then employed, (as thoſe of *Oſtend*) were ſearched, and the Enemies pulled out, but no other matter done: however it is moſt certain, let the *Commiſſion* or *Protection* of ſuch Ships be what they will, if Men will venture to trade under ſuch a Cloak, it behoves them, that the *Skipper* and his *Crew* be entirely ignorant; for it is his action that will go far in the freeing, or making abſolute the prize, and Goods ſo made prize, the property is immediately gone and changed, be the Owner who he will, he never can claim the ſame; for the Laws of Nations *made the Enemies firſt Maſters by External Dominion, and then by Conqueſt gave the property to the Captor*: following that Judgment of the *Romans*, *Whatſoever they got of their Enemies by Valour, they would tranſmit to their Poſterity by Right.*

Conſul. Marit. c. 273.

Hoſtis ſit ille, & qui intra præſidia ejus ſunt: Let him be our Enemy, and they that are within his Guards. *Liv. lib.* 37. *& alibi paſſim.*

Gregor. lib. 9.

Romani nos honeſtiſſimas eas atque juſtiſſimas credimus poſſeſſiones quas Belli Lege captas habemus; neque verò induci poſſimus ut ſtulta facilitate deleamus virtutis monumenta, ſi eas illis reddamus, quibus ſemel perierunt: imo vero tales poſſeſſiones, non tantum cum his qui nunc vivunt civibus noſtris communicandas; ſed & poſteris relinquendas cenſemus: tantum abeſt ut parta relinquendo in nos ipſos ea conſtituamus, quæ in Hoſtes conſtitui ſolent. Titus Largus his opinion in the Senate of Reſtitution: We *Romans* believe thoſe poſſeſſions to be moſt Honourable and juſt, which we have taken by the Law of War; nor can we be induced

ced by a fooliſh Facility to part with the Monuments of our Valour, and reſtore them to thoſe that were not able to keep them; nor do we judge ſuch poſſeſſions to be communicated only to our Country-men now living, but to be left to our Poſterity. So far are we from relinquiſhing what we have got, and dealing with our ſelves, as if we were our own Enemies. *De Veij. idem in Romulo narrat Plutarchus*

XIX. 'Tis not againſt nature to ſpoil the Goods of him, *whom it is lawful to kill*; and by the Laws of Nations it is permitted that the Goods of Enemies may be as well ſpoiled as taken; and *Polybius* obſerves, That all things of the Enemies may be ſpoil'd, their Ships, Goods, Forts, *&c.* *Hiſt. 5. Grot. de Jure Belli & pacis lib. 3. c. 12. §. 1.*

XX. And though it may happen ſometimes that a War may break out, and there may be no publick denouncing or proclaiming the ſame; that if a Friend or Neuter ſhould aſſiſt an Enemy with *Contraband Goods*, that is, Arms, *&c.* whether upon ſuch a caption the Goods may be made prize; the reſolution of which will depend on theſe Conſiderations. *3 Eliz. in C.B. Owen's Report, fol. 45. but quære of that Caſe.*

Firſt, By natural Law, *where either force offered, is repelled, or puniſhment exacted of one that hath offended, and is denied*, there needs no denunciation; for Princes are not to ſtand debating with Words and Arguments, being injured beyond Words: *For War undertaken to reſiſt violence, is proclaimed not by an Herald, but by Nature*: for it is no more than the invading of one for another, or taking of the Goods of the Debtor, to anſwer the Creditor's damage. *Grotius lib. 3. cap. 3. § 2, 3.*

Secondly, *Interpellation* is introduced by the Laws of Nations, whereby Princes or Republicks having receiceived injuries, may apparently ſhew that they had no other way to recover their own, or that which is due to them: for ſuch *Interpellation* following after injuries committed, conſtitutes that Prince or State in a fault *that ſhall not render ſatisfaction.* *Vid. Marianam 27. 13.*

Thirdly, Admitting that *Interpellation* hath gone, and ſatisfaction hath been required for the damage, and no ſatisfactory return hath been made, whether then the Ships or Territories of the Enemy may be aſſaulted: and for that it has been conceived they may, for denunciation is no more but to ſignifie that the parties, againſt whom the ſame is commenced, *are unjuſt and will not do right*, *Denunciation is either condicionate or pure: Condicionate where it is joyned with remanding of things, and in the*

right, and therefore War is begun by the Supream Power. Now Princes or Republicks having done that which by the Law of Nature they were not obliged to do, that is, after a wrong done, abſtained from War by Friendly demanding of Satisfaction or reparation (which is requir'd only by the Laws of Nations) and publick Juſtice being denied them, there remains no other or further obligation on the State, the ſame amounting to, and indeed is an apparent *defiance*; and *Proclamation* is no other.

name of *res repetitæ* the Heralds Law, called *Jus feciale*, comprehended not only vindication by right of Dominion, but alſo the proſecution of that which is due upon a Civil or Criminal Cauſe. *Severius.*

XXI. True it is, that while the *Romans* were uncorrupted in their Diſcipline, they were religiouſly ſcrupulous in beginning a War; for they never ſent forth their Armies till they had ſought for Juſtice in the tract of Peace, and after the publick promulgation of their intent. Such alſo was the integrity of the *Achæans*, before they had forewarned the Enemy to a defence. *Machiavel* commends the ſimplicity of the Ancient *Florentines*, that enterpriſed no Hoſtility on their Neighbours till they had by ringing a Bell for the ſpace of a whole Month, ſummoned them to a peaceable ſatisfaction or a brave reſiſtance: but theſe Cuſtoms and Inſtitutions are only of ſome Countries, not from the Law of Nations; the white Rod among the *Greeks*, the Turffs and Bloody Spear among the *Equicolæ*, renunciation of Friendſhip and Society (if there had been any) thirty ſolemn days after ſatisfaction demanded, * are rather introduced by that which we call the Cuſtom or Law of particular Kingdoms and States; for there may be War no Queſtion introduced, without any ſolemn Proclamation, as the violation of Ambaſſadors by approbation of publick Authority is an open denunciation of War, and upon the ſame Reaſon *Guſtavus Adolphus* invaded † the *German* Empire, without ever declaring War, to revenge the contumelious uſage of his Ambaſſadors at *Lubeck*. The form of denunciation of War, which is either conditional, or abſolute, Conditional, when reſtitution or ſatisfaction is demanded at the ſame time, when the War is denounced. A pure or abſolute denunciation, is that which eſpecially is called

—— *ad* 10. *Æn.* explains it rightly, thence was that in the Forms *to be rendred, to be ſatisfied, to be yielded*, where to be yielded, as we have ſaid elſewhere is to be underſtood, unleſs they that are called upon will rather puniſh the guilty themſelves: this requiring of things *Pliny* teſtifies was named Clarigation. *lib.* 8.

* The throwing of the Spear and ſuch ſort of Cuſtoms which did not belong to the Law of Nations, which in proceſs of time became obſolete; nay

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an Indiction or Proclamation, which is either when the other Party hath already begun the War, or when he himſelf hath committed that which deſerves to be puniſhed. *See Examples Grot. lib. 3. c. 3. 8. 7.*

the third Punick War was once indicted and gun. Varro lib. 4 de l. † *Phil.*

Arlanibæus Arma Suecica fol. 13. 37. Zouch de Jure Feciali part. 2. ſect. 10. qu. An bellum aliquando omiſſa indiſtione movere liceat?

XXII. But if War be indicted, or is begun againſt him who hath the higheſt Power over the People, it is ſuppoſed to be proclaimed againſt all his, not only Subjects, but thoſe who will join themſelves unto him, as being an acceſſion to his party. And this is that which the Law interprets, *the Prince being defied, his adherents alſo are defied*; for to proclaim a War is to defie, which is to be underſtood of that ſame War which is waged againſt him to whom it is indicted, as when War was denounced againſt *Antiochus*, they were not pleaſed to denounce it againſt the *Ætolians* apart becauſe they had openly joined themſelves with *Antiochus*: the Heralds anſwered, *Ætolians have declared War of their own accord againſt themſelves*; but that War being ended, if another People or King, for ſupply of Aids, is to be warred againſt, that the effects of the Laws of Nations may follow, there will be need of a new Indiction, for now he is not lookt upon as acceſſary, but Principal: wherefore it is rightly ſaid, That by the Law of Nations, neither the War of *Manlius* upon the *Gallo-Greeks*, nor of *Cæſar* upon *Arioviſtus* was lawful. For they were not aſſaulted now as an acceſſion of a Neighbour's War, but principally: to which purpoſe, as by the Law of Nations Indiction, ſo by the Roman Law a new Command of the Roman people was neceſſary. For what was ſaid in the propoſal againſt *Antiochus*: *was it their will that War ſhould be entred with King* Antiochus *and thoſe that followed his Party* (which was obſerved alſo in the Decree againſt King *Perſeus*) ſeems truly underſtood ſo long as the War continued with King *Antiochus* or *Perſeus*, and thoſe that really immixed themſelves in that War.

Diffidato Principe, diffidati ſunt ejus adhærentes. Baldus ad Leg. 2. C. de Serv. n. 70.

Liv. lib. 36.

Idem dici poteſt de bello ſociorum Ulyſſis in Cycones Priamo quondam auxiliatos, de quibus Hom. Odyſſ. 1 & ibi Didymus.

Livius lib. 36. 42.

XXIII. Now the true Reaſon wherefore Nations required Denunciation to that War which was ſaid to be juſt by the Law of Nations, was not that Force ſhould be offered privily, or carried on by deceit, for that per-

tains more to the excellency of their Valour than to ſtrict Right; (for ſome Nations (as we have read) have appointed their Enemy the time and place of Battle) but that it might certainly appear the War was not waged by a private undertaking, but by the will of either people or their Heads. *Servius Honoratus* when he had deduced the Original of the Heralds Law from *Ancus Manlius*, and further from the *Æquicolæ*, ſaith, *That if at any time Men or Beaſts were by any Nation taken from the People of* Rome, *the* Pater Patratus *went with the Heralds* (that is, Prieſts) *who have Authority in making Leagues, and ſtanding before the Bounds, with a loud voice pronounced the cauſe of the War; and if they would not reſtore the things taken, or deliver up the Authors of the Injury, he threw a Spear, which was the beginning of the fight,* and thenceforth it was lawful, after the manner of War, to take the Spoil.

Tum certare odiis, tum res rapuiſſe licebit.

XXIV. War is not only lawful againſt thoſe that are our Enemies, but likewiſe againſt thoſe that ſupply them; but yet we muſt diſtinguiſh of the things themſelves. For ſome things there are that have uſe only in War, as Arms: ſome that have no uſe in War, as thoſe that ſerve for pleaſure: ſome that have uſe both in War and out of War, as Money, Corn, Victuals, Ships and things belonging thereto.

1. It is plain, that by the firſt he is my Enemy that ſupplies my Enemies with things neceſſary for the War.

2. But by the ſecond he is not, according to that of *Seneca: I will not help him to Monies to pay his Guards; but if he ſhall deſire Marbles and Robes, ſuch things hurt not others, only they miniſter to his Luxury: Soldiers and Arms I will not ſupply him with; if he ſhall ſeek for Players and Recreations to ſoften his fierceneſs, I will gladly offer to him: Ships of War I will not ſend him, but ſuch as are for Pleaſure and Oſtentation of Princes ſporting in the Sea.* I will deny to give to one that purpoſes the deſtruction of another's Country thoſe things that are eſſential, for it is a bounty not to be allowed of.

French and *Dutch* in enmity, and the *Engliſh* neuter with both, the latter permitted the *French* King to build a Veſſel of Pleaſure at *Portſmouth*, which was ſent into *France*, and was no breach of the Neutrality, *Anno* 1676.

3. But in the third, which is a doubtful uſe, there the ſtate of the War is to be conſidered: For if I cannot defend my ſelf unleſs I intercept the things ſent, neceſſity

ceſſity will then give right, but with the Burden of Reſtitution *, except ſome other cauſe accede; but if the apportation of thoſe things hinders the execution of my right, and he could know ſo much who brought them, as if I had driven the Enemies Fleet into a Port or Haven, or had ſtraitned a Town with a Siege or Bloeade, and were now in expectation of their yielding or compounding, there is no queſtion but he that ſhall in ſuch caſe ſuccour my Enemy, ought in Juſtice be made liable for the Damage I have ſuſtained through his means: like a Gaoler that ſhall wilfully ſuffer my Priſoner to eſcape; or one that hath reſcued my Debtor juſtly detained by me for my damage, whereby I am injured and according to the meaſure of my loſs his Goods alſo may be ſeiz'd and brought into ſuch a ſtate, to the end I may obtain a juſt ſatisfaction. But if he hath not yet done any damage, but hath been willing to do it, there will be a right by retention or ſtaying of the Ship and Goods to compel him to give caution for the future; but if my Enemies injuſtice towards me be moſt evident, and a Nation that ought to be Neuter confirm him in that moſt unjuſt War, in that caſe it will not only Civilly be liable, but Criminally as one that reſcues a Pirate manifeſtly guilty from the Judge at the very Bar, and therefore it will be lawful to determine againſt him by ſuch meaſures as are neceſſary and meet for his Offence, wherefore within thoſe rules, he may be ſpoiled of Ship and Lading; and that is the true reaſon wherefore Indiction or publick Proclamation by internal right ought to be denounced, that ſo other Nations may ſee they have a juſt cauſe who commenc'd the War, and that they ought not to be impeded in the acquiring due ſatisfaction.

* *Grotius in jure Belli & Pacis lib.* 3. *c.* 1. §. 5.

The *Engliſh* drive the *Dutch Eaſt India* Fleet into *Bergen*, and the *Dane* there protected them againſt the League and the Laws of Nations, for which the enſuing War was accounted juſt on the King of *Britain's* part. *Sylv. in. verb. Reſtitut. pag.* 3. §. 12.

And though Neuters are not compellable, by the rigor of War, to afford aſſiſtance to either Party without the Will of the other, yet ſuch may the emergency of the caſe be, that if enforc'd, they may lawfully declare, though to the damage of the weaker. Such was the caſe, when the *Venetians* had ſo far prevail'd againſt the *Turks* in *Candia*, that *Canea* which they then beſieged by Sea and Land, was brought to that extremity that in all

human probability it muſt then have been ſpeedily ſurrendred, the *Engliſh* Ships being then at *Smyrna*, and preſt by the *Turk* to aſſiſt the *Grand Signior* in the relief of that City. If the Perſons whom the *Engliſh* had thus aſſiſted, had been Chriſtians, there is no queſtion this Auxiliary aid had been well; but to aſſiſt an Enemy of Chriſtianity againſt Chriſtians themſelves hath ſeemed doubtful: but ſurely there ſeems little reaſon for ſuch an Ambiguity; for if it be lawful to make League with thoſe that are Aliens from the true Religion by the Law of Nature, then there can be no doubt but they may be aided. Now by the Law of Nature they may be entred into by Chriſtians with ſuch, for that Law is ſo common to all Men, that it admitteth not any Difference of Religion: nor was the ſame univerſally forbidden by the *Hebrew* Law, as appears by *Abraham*'s aiding the wicked *Sodomites* with his Arms; and that which was very remarkable, that the *Aſmoneans* being exceeding skilful in the Law, and great Obſervers of the *Hebrew* Rites, yet made they Leagues with the *Lacedæmonians* and *Romans* by the conſent of the Prieſts and People, yea and publickly offered Sacrifice for their ſafety: nor were they forbidden by the Evangelical Law, according to that of *Tertullian* who obſerves, That ſo long as *Iſrael* was only his people, God did juſtly command mercy towards their Brethren alone; but after that, he gave unto *Chriſt the Nations for his inheritance, and the ends of the Earth for his poſſeſſion,* and that began to be paid which was promiſed in *Hoſea, They that were not my People ſhall be my People, and the Nations that had not obtained mercy ſhall obtain mercy*; From that time Chriſt hath extended unto all the Law of fraternal benignity, excluding none from our Compaſſion, no more than from his Vocation: from whence it follows, that the action of thoſe Captains being then in the power of the *Turk*, was lawful in the aſſiſting them againſt the *Venetians*.

Lato coruto in Thargum.

Vid. Carolum Molin. tract. 2. de diſput. 112.

Lib. 7. Ch. 3.

Vide the Caſe at large in the end of this Chapter.

XXV. And although the Goods of Friends, according to the circumſtance of the caſe, may be preſerved by adjudication, and reſtored to their owner; yet all manner of Goods have not that priviledge: For though the *Freedom of Trade* preſerves the Goods of Friends, againſt the

Jus feciale.

the *rigor of War*, yet it does not *thoſe Goods that ſupply the* Enemy for War, as *Money, Victuals, Ships, Arms, and other things belonging thereto*; for to ſupply an Enemy that invades our right, or ſeeks the deſtruction of our Countries, is a liberality not to be allowed of, and it certainly ſtands with neceſſity, that *if I cannot ſafely defend my ſelf or endamage my Enemy without intercepting the things ſent, it may juſtly be done*: but when ſuch goods are ſeized, whether they give the Captor a right of Property, or right by retention, to compel that neuter Nation to give Caution for the future, by *Hoſtages* or *Pledges*, not to ſupply the Enemy, may be a queſtion. The *Romans* who had brought Victuals to the Enemies of *Carthage*, were taken by the *Carthaginians*, and again rendred upon requeſt; the *Hollanders* in the heat of the War between *Sweden* and *Poland*, never ſuffered themſelves to be interdicted with either Nation; the ſame State when they had War with *Spain*, intercepted the *French* Ships, paſſing to or from *Spain* but reſtored them.

Vide Treaty 1 *Dec.* at *London* 1674. Art. the third, what's meant by Goods Contraband or prohibited Merchandize.

Cambden vide Ann. 1589. 1595.

And *Pompey*, in the Hiſtory of the *Mithridatick* War, ſet a Guard on the *Boſphorus*, to obſerve if any Merchant ſail'd in thither; whoſoever did, and was taken, was ſurely put to Death; ſo *Demetrius* when he poſſeſs'd *Attica* with his Army, having blockt up *Athens*, hang'd up both the Maſter and Commander of a Ship, who attempted to bring in Corn: the *Hollanders* having blockt up *Dunkirk*, ſome *Engliſh* Merchants Ships did attempt to enter, but were denied by the *Hollanders*.

Plutarch.

Meurſius in his *Daniſh* Hiſt. 1. part. 2.

Moſt certain, if a *Neuter Nation* hath had notice of the War, and Caution given them (as is uſual) not to ſupply the Enemy with the Counterband Goods, as they call them; if ſuch be the caſe, the prize is become abſolutely the Captor's. So Queen *Elizabeth* did, when ſhe ſeiz'd on the 60 Sail of the *Hanſiatick Towns*, who were carrying of Goods, *ropas contrabanda*, to the *Spaniard* her Enemy; ſhe condemned them, and made them abſolute prize; *For as neuters are not compellable by the rigour of War, to give any thing againſt their Will, ſo muſt they not againſt the Will of each Party afford ſuch things as may damage one another.* For Perſons or Nations having had notice of the War, which is done, and Caution given ſometimes by *Proclamation*, or ſome other publick

Vide Tit. Cuſtoms.

31 *Eliz.* C. B. *Owen* 45.

Edict, ſignifying the right of their Cauſe, and ſhall afterwards gather to, and aſſiſt the Enemy, whether Aſſociates, Neuters, or Subjects, the ſame yields *a right*, ſo far as to them, not only to the charge and damage that may fall thereby, by making them prize; but may make them obnoxious to puniſhment: *For it is the Duty of thoſe that abſtain from War to do nothing for the ſtrengthning of him who maintains a bad Cauſe, whereby the motions of him that wageth a juſt War may be retarded*; and where the cauſe is doubtful they ought to ſhew themſelves equal to both, permitting paſſage, baking, dreſſing, and affording Proviſion for each Army or Navy.

Bald. adl. 2. *c. de Seven* 70.

Under the Name of Contraband may be comprehended Arms only, as pieces of Ordinances, with all Implements belonging to them, Fire-Balls, Powder, Matches, Bullets, Pikes, Swords, Lances, Spears, Halberts, Guns, Mortar-Pieces, Petards, Granadoes, Musket-reſts, Bandaliers, Salt peter Muskets, Musket-ſhot, Helmets, Corſlets, Breaſt-plates, Coats of Mail, and the like kinds of Armature; ſo for Horſes and other Warlike Inſtruments. *Vide Marine* Treaty between *England* and *Holland*, *Decemb.* 1. 1674. *Art.* 3. *Vide* the Attempt made by *John Burrough* to Trade with the *Swede* expreſly againſt the Interdiction of the *Daniſh* King: Sir *Walter Raleigh*; *l.* 5. *c.* 1. § 10.

So likewiſe it is Ships Maſts, and whatſoever ſhall be thought or aſcertained capable of Arming an Enemy.

Bartol. l. nullus nunc. lib. 2. *de Judeis Cœlicolis.*

L. Æmilius Prætor accuſed the *Tejans* for victualling the Enemy's Navy, promiſing them Wine, adding, That unleſs they would do the like for the Navy of the *Romans*, he would account them as Enemies: but common experience hath taught Nations and Kingdoms, when they declare Neutrality, to make Proviſion by way of League with both the Nations at War, that when it ſhould happen the Armies of both, or any draw towards their Territories, it might be lawful for them to exhibit the *Common Offices of humanity* to both.

Anno 1650. or 1651. *vide R. Cooke* of the church's ſtate n equal dan-

It happened that about ſeven ſtout Merchant Men rode in the Port at *Smyrna*; the General of the *Venetians* being jealous of their joining with the *Turkiſh* Armado, deſired to know their Minds, who anſwered, they would prove Neuter in the diſpute; but afterwards (though at firſt the Captains all refuſed) upon the threatning of the *Grand Signior*, to lay an Embargo on all the Goods of the *Engliſh* Nation in his Dominion, and to make ſlaves of their Perſons; thoſe Captains were forced to join with the *Turkiſh* Forces, who beat the *Venetians* from before *Canea*, and ſo reliev'd it; the *Vene-*

Venetian's Ambaſſador complained to the then Powers in *England*, but could have no Relief, being anſwered, *That thoſe Ships being in the Turks Power, were ſubject to it*, the accident being ſuch as made the Action lawful, as we *have* afore remembred. ger with the Trade.

Leagues may be made with Infidels, by the Law of Nature, and likewiſe by that of Religion, which is ſo equally indulgent to all Men, that it will not admit of any difference upon the Score of Religion. *Vid.* Examples and Cautions. *Grot. de jure belli & pacis lib.* 2. *Cap.* 15. §. 8, 9, 10, 11, 12.

CHAP. II.

Of Letters of Marque and Repriſal.

I. *Of Repriſals generally conſidered, and for what Cauſes awarded.*

II. *Whether unlawful by the Law of Nature and of the* Roman *Law.*

III. *Where lawful by the Laws of Nations at this day, and the reaſons wherefore they are ſo received.*

IV. *Of the Advantages that accrue univerſally by ſuch Repriſals.*

V. *Of the eſſential cauſes or grounds generally for the awarding Letters of Repriſals.*

VI. *Of the eſſential cauſes or grounds particularly that are requiſite before they can be awarded by the Laws of Nations and of this Realm.*

VII. *Of the ordinary and extraordinary by the Laws of* England.

VIII. *Whether the ſame creates a debt in the Grantee, and whether the Execution may be ſuſpended.*

IX. *Whether the awarding the ſame amounts to a Breach of Peace.*

X. *Of Letters of Repriſal extraordinary where granted, and of what force.*

XI. *That it conſiſts with the Intereſt of Princes, not only to prevent thoſe things that may occaſion Repriſe, but likewiſe not to deny the ſame, if there be ground ſufficient.*

XII. *The difference of Injuſtice offered to Subjects and to Foreigners, and where the one is concluded by the ſame and not the other.*

XIII. *What is meant by denying of Right and doing of Injuſtice, and where Repriſal takes rooting, and where not.*

XIV. *Of Repriſals where awarded for denying of common Juſtice or thoſe which are called Letters of Marque in caſes ordinary.*

XV. *Not repairing the damage after Letters of Requeſt creates a National debt, and is the Foundation of Repriſal.*

XVI. *Domicil not Origination ſubjects to repriſe.*

XVII. *Repriſal not grantable, if the ſpoil was occaſioned by War.*

XVIII. *Of Perſons exempted from Repriſal by the Laws of Nations, Canon and Civil Law.*

XIX. *Where Ships and Goods are ſubject to Repriſe, and where not.*

XX. *When Right is denied, whether life is engaged, and whether perſons refuſing to yield may be ſlain.*

XXI. *Goods taken by Repriſe where the property is altered, and where not tryable in the Admiralty.*

XXII. *Where many Ships are preſent, and one becomes Captor, whether the ſpoil muſt be divided, or remain his that became Maſter of the Prize.*

XXIII. *Where the Grantee of Letters of Repriſal may become a Pirate notwithſtanding ſuch Commiſſion.*

XXIV. *Where a miſcaption creates not an Injury in the Grantee, nor ſubjects him not to anſwer damage to the ſufferers.*

XXV. *Of the Duties incumbent upon the Captor, and whether the Goods taken are ſubject to pay Cuſtoms.*

XXVI. *After the debt and damage ſatisfied, reſtitution of the reſidue ought to be made.*

XXVII. *Contribution, whether it can be by the Laws of* England *to him whoſe Goods are taken by Repriſe.*

XXVIII. *Where Commiſſions have been awarded for the inquiring of Depredations, under which the Parties have ſometimes obtained ſatisfaction.*

I.

I. REpriſals known to us by the word *Repriſalia*, or *Letters of Marque*, in Law have other appellations, as *Pignoratio*, *Clarigatio* and *Androlepſia*, &c. in imitation of that *Androlepſia*, among the *Greeks*, to ſeize the three next Citizens of that Place, whither the Murderer had fled, and was always given to him who required revenge of the Offender; the word (*Reprizals*) is from the *French reprendre* and *Repriſe*, *i. e. reſumptio*, that is, to re-take or take again one thing for another, like our *Saxon* Withernam. Though the Act is now become lawful by the *Law* (indeed *conſent*) of *Nations*, yet muſt it have its Standard-mark, for the ſame cannot be done by any private authority, but only by the power of that Prince or Republick, whoſe Subject the injured perſon is; nor is the ſame grantable by Authority, but where the party injured has *Juſtice denied him*, or the ſame *illegally delayed*.

Grot. de Jure Belli et Pacis lib. 3. c 2. §. 4, 5.

Repriſals are all one, both in the Common and Civil Law; *Repriſalia eſt poteſtas pignerandi contra quemlibet, de terra debitoris data creditori pro injuriis & damnis acceptis, vocabular. utriuſque Juris.* 27 *E.* 3. *Stat.* 2. *cap.* 17. 2 *Inſt.* 204, 205.

II. By the *Law of Nature* no Man is bound for another's Act, but only the Succeſſor of his Eſtate, for that Goods and Eſtate ſhould paſs with their *Burthens*, was introduced together with the *Dominion* of things; hence it is that the Son cannot be moleſted for the debt of his Father, *neither the Wife for the debt of the Husband, nor the Husband for the debt of the Wife; the ſame being againſt natural equity, that one ſhould be troubled for the debt of another.

So it is, that no particular Men owe, or are obliged for the debt which the *Community* owes, that is, if the *Community* have any Goods; but if Money be lent to a *Community*, each particular is naturally bound, as they are a part of the whole, if the Stock publick be wanting. If one lends my Country Money (ſays *Seneca*) *I will not call my ſelf his Debtor, yet will I pay my ſhare.* And again, *Being one of the People, I will not pay as for my ſelf, but contribute as for my Country.* Naturally, nay, by the very *Roman Law*, *one Village was not bound for the other, nor one Man's Poſſeſſions charged for another; no not ſo much

* *Leg unica, c. ut null ex vicanis c. ne uxor pro mar. & ne fil. pro patre, totis tit.*

Ulpian. l eg ſicut ſect. quod cuique univerſorum Et ſinguli debebunt non tanquam propri um, ſed tanquam publicam publici partem. Seneca lib 6 de Beneſic. c. 20. & cap. 19.

* *Leg. nullum,*

c. de Execut. & Exactionibus.

much as with the debts publick: the reaſon being added *That it was againſt reaſon for one to be charged with the deb of another.*

III. And though by the *Law of Nature* one Man's Goods are not tyed for the debts of another, no nor for thoſe of the *Publick*; yet by the voluntary Law of Nations, the ſame might be introduced and brought in, and the ſame may ſtand well with the *Laws of Nature*; for that might be introduced by Cuſtom and tacit Conſent, when even Sureties without any Cauſe, may ſubject and make liable their Goods and Eſtates for the Debts of a Stranger. So likewiſe that for any Debt, which any *Civil Society*, or the *Head* thereof ought to make good, or becauſe the *Sovereign* or a *Head* hath not done right in another's Debt, but hath made himſelf liable to render ſatisfaction; ſuch a *Society* may oblige and make liable all their Goods corporeal or incorporeal, for the reddition of Satisfaction. Hence it was, as the Great *Juſtinian* obſerves, That this Cuſtom was conſtituted by the *Nations*, grounded on the urgency of humane needs, aſſerted with the greateſt of Neceſſities: ſince without this, great licence would be given and tolerated for the committing of depredations and injuries; eſpecially if only the Goods of Rulers were made liable, who ſeldom poſſeſs any thing, that for ſatisfaction, the injured may eaſily come by, whereas thoſe private Men, whoſe Commerces are various, may be catcht for recompence, ſometimes with the greateſt of eaſe, and freeſt from danger. Beſides, the Owners of ſuch Prize being Members of the ſame *Society*, might more eaſily obtain mutual right for ſatisfaction of the injur'd, and their own future indempnity than Foreigners could, who without ſuch a Tye would be very little regarded.

In Nov. Juſt. 52. 134. C. a-mico de injuriis in ſexto. Juſt. Inſt. de Jure Nat.

Baldus 3. conſ. 58. Bartol. de repreſſ. q. 5. ad tertium 9.

IV. Beſides, the Benefit of this Obligation was common to all Nations, ſo that they which were one time grieved with it, another time might be eaſed by the ſame. Moreover that this Cuſtom was received, appears not only out of full Wars which Nations wage againſt Nations (for in theſe what is obſerved may be ſeen in the Forms of the ancient Denunciations. *Populis priſcorum Latinorum, hominibuſque, priſcis Latinis bellum*

Liv. lib. 1.

indico

dico facioque. So likewiſe in the Propoſal: *Vellent, jubent Philippo Regi Macedonibuſque, qui ſub regno ejus eſſent,* Lib. 31.
llum indici. And in the very Decree or Proclamation Gellius lib. 16.
t ſelf: *Populus Romanus cum populo Hermundulo hominibuſque, Hermundulis bellum juſſit*) but alſo where Wars are cap. 4.
ot come to that fulneſs of War, yet there is need of a certain violent Execution of Right, that is imperfect War. *Ageſilaus* of old ſaid to *Pharnabazus*, a Subject to Plutarch Ageſil.
he King of *Perſia*: *We,* O Pharnabazus, *when we were the King's Friends, carried our ſelves like Friends towards all his, and being now become his Enemies, we carry our ſelves like Enemies; wherefore ſeeing you will be one of the things that are his, we do juſtly oppoſe him in you.* A ſpecies of his ſort of Execution by Reprizal was that which the *Athenians* called apprehenſion of Men, of which the Attick Law (as Mr. *Rous* obſerves) *If one have force offer'd him and die, his Kinſmen and Friends may apprehend Men, till either the Manſlayer be duly puniſht or yielded; but it is lawful to apprehend three Men and no more.* By which it Archaeologia Attica.
plainly appears, that for the debt of the City which is bound to puniſh her Subjects that have hurt others, is tied a certain incorporeal right of the Subjects, that is, the liberty of taking whom they pleaſe, and doing what they will: So that ſuch Perſons ſo taken, by that Law might be made Slaves until the City did do that which by Law ſhe was obliged to perform. In like manner to recover a Citizen taken Captive by manifeſt Injury, are the Citizens of that City, where the Injury was done, retained by Reprize. Wherefore at *Carthage* they would not ſuffer *Ariſton* the *Tyrian* to be taken; for, ſaid they, *the ſame will befal the Carthaginians at* Tyre, *and in other Towns of Trade, whereto they often reſort.*

Herod to whom it was not lawful to make War againſt the *Arabians*, might lawfully uſe pignoration. Joſeph. lib. 6.

Liv. lib. 34.

V. A due Adminiſtration of Juſtice is not the leaſt ſenſe, wherein Princes are ſtiled Gods: To deny or delay Juſtice is Injuſtice; Juſtice is every Man's right who hath not forfeited what he might claim by the *Jus Gentium.*

If therefore the Party cannot obtain his Definitive Sentence or *Judgment*, within a fit time againſt the Perſon of whom he complains, or if there be a Judgment given againſt *apparent Right* and Law; yet if no Relief can

C. *Si ſententia c.* 16. *de Sent. excom. in* 6 *conſtit. Leg. qui reſtituere de rei vindic.*

can be had, the Bodies and Moveables of his Subje who renders not right, may be taken.

VI. In the Proſecution of which there muſt be,

1. The Oath of the Party injured, or other ſuffici Proof, touching the pretended Injury, and of certain Loſs and Damage thereby ſuſtained.
2. A Proof of the due Proſecution for the obtaining Satisfaction in a legal way.
3. Protelation or denial of Juſtice.
4. A Complaint to his own Prince or State.
5. Requiſition of Juſtice by him or them, made to Supream Head or State, where Juſtice in the ordi ry courſe was denied.
6. Perſiſtency ſtill, in the denial of Juſtice.

All which being done, Letters of Reprizal under ſ cautions, reſtrictions, and limitations as are conſonant Law, and as the ſpecial caſe may require, may iſſue only by the *Jus Gentium* and *Civile*, but by the anci and municipal Laws of the Kingdom *.

* *Magna Charta* C. 30. the latter Clauſe.

Clauſ. 7. *Johan. Reg. m.* 22. *Pat.* 15. *E.* 3. *part.* 2. *dorſ.* 48. *Pat.* 23 *H* 6. *part.* 2. 14, 15,

VII. The *Reprizals* grantable by the Laws of *Engla* are of two ſorts, *Ordinary* and *Extraordinary*. The *Or nary* are either within the Realm or without, and are ways granted where any *Engliſh* Merchants or their Goo are ſpoiled, or taken from them, in parts beyond the S by Merchants Strangers, and cannot upon Suit, or t King's demanding of Juſtice for him, obtain the ſam he ſhall have upon Teſtimony of ſuch proſecution, a W out of the *Chancery*, to arreſt the Merchants Strang of that Nation their Goods here in *England*; the whi is grantable to the Subject opreſt of *Common Right*, the *Chancellor* or *Keeper* of *England*, who always in ſu caſe hath the approbation of the King or Council, both, for his ſo doing; the other, which is for ſat faction out of the Realm, is always under the Gre Seal.

Fitz. H. N. Bre. 114. *a. b. Reg.* 129. *Pat. Rolls* 14. 14 *H.* 6. *par.* 1. *dorſ.* 15. 17. 22. & *M.* 5. 6. 7. *patr.* 2. *dorſ.* 38. 22 *E.* 4 *par.* 2. *M.* 25. *dorſ.* 2. & 4. *Inſt.* 124. 125. 137. *Lex. Mercat.* 120.

VIII. But Letters of Reprizal granted in the *Ordin* way for reparation out of the Realm, which are alwa under the Great Seal of *England*, cannot be revok

(thou

(though perhaps in point of State there may be a ſuſpending the Execution of them for reaſon grounded on the publick good) and the reaſon wherefore they cannot be annulled or revoked is, becauſe after the Perſon injured hath petitioned, and hath according to Law made out by proof his loſs, and Letters of Requeſt have gone, and no reparation made, then the Letters Patents of Reprizal being ſealed, the ſame does immediately create and veſt a National Debt in the Grantee to be ſatisfied in ſuch manner and by ſuch means as the ſame Letters Patents do direct out of the Goods and Eſtates of his Subjects, who refuſes or protelates to do right (however as the King hath the Legiſlative power of Peace and War in a publick Treaty for the Nation's good, they may be mortified, and then revoked by the great Seal in purſuance of that Treaty.)

Leg. qui reſtituere de rei vindic.

Vide Treaty 1666. *Breda Art.* 5.

Nor do I ſee it an act unjuſt internal to deny the Execution of ſuch Letters Patents, according to that of St. *Paul*, *All things are lawful for me, but all things are not expedient.* Now to the true Interpretation of the word *lawful* ſtrictly, it is to do a thing without violating the Rules of Piety and Charity. Now there are many things amongſt men which are not internally juſt, and cannot be done without violating the Laws of Charity, yet are lawful to be done, as in the Law of the *XII. Tables, the Creditors might divide the Debtors Body amongſt them.* So in acquiring ſatisfaction for Damages, the Lives and Goods of Innocents may be involved in Death and Deſtruction, whoſe peaceable Tract in Commerce never gave them knowledge of this *privatum Bellum*, nor were they Actors in the Injury original. 'Tis true externally, according to that of *Lucan*, *That Prince or State that denies me right, gives me all.* But the incomparable *Cicero* obſerves, *That there are ſome Offices to be done to them from whom you have receiv'd an Injury, for revenge and puniſhment muſt have a meaſure.* Now if the ſupream Power does think that the Execution of ſuch Letters of Reprizal cannot well be effected without endangering the Peace of both Eſtates, there may be a juſt cauſe to reſpite the Execution till a time more convenient may occur, for that the Lives and Eſtates of thouſands may be involved in the repairing of one Injury, private and pecu-

Quintilian.

Omnia dat qui juſta negat.

Cicero ipſe orat. pro Balbo.

Eſt enim aliquid quod non oporteat, etiam ſilicet. Idem pro Milone.

peculiar: Nor do I ſee the ſame to appear repugn to the Laws poſitive that have been made for the au ding thoſe Commiſſions. 'Tis very true the Statut

† 4 Hen. 5. c. 7. reciting, 'That at the grievous Complaints of 'Commons of *England*, who had ſuffered many Wro 'and Injuries in the Loſs of their Ships and Goods up 'the main Sea againſt Leagues, ſafe-Conducts, and T 'ces which were broken by the Subjects of other N 'tions, the ſame Parliament reciting their willingn 'to provide Remedy and Relief for the grieved 'ſpoil and injuries done unto them beyond the Seas, u 'on Complaint to the Keeper of the Privy Seal (on ſ 'evidence ſhewn) he ſhall ſign Letters of Requeſt 'demand reſtitution and reparation to the Part 'grieved: Which if not made in convenient time, th 'the Lord Chancellor of *England* ſhall grant Letters 'Reprizal in due Form of Law for the Indempnity 'the Perſons intereſſed and injured. Yet this does no reſpect reſtrain the King's Prerogative and Autho ty, which he had at the Common Law in the judgi the conveniency and time, when to be executed. N does the Subſequent Statute †, reciting: 'Whereas

† 14 Ed. 4. c. 4. 'bers great offences were often committed again 'Leagues, Truces, and Amities between the King a 'other Princes or States, againſt ſafe-Conducts and L 'cences, and againſt the Laws and Statutes of the Real '(in that caſe made and provided) to the great ſlander 'our Soveraign Lord the King, and the Damages of th 'good Subjects the Commons of England. It was ther 'fore Ordained, Eſtabliſhed, Enacted, and Confirmed b 'the Conſent of the Lords Spiritual and Temporal, an 'Commons aſſembled in Parliament, That all Statute 'and Ordinances againſt the Offenders of Leagues, Tru 'ces, ſafe-Conducts, and Amities ſhall be in full forc 'excepting the Clauſe in the Act which made it High 'Treaſon in the Second Year of Hen. 5. Therefore i is plain there were Statutes made for the more effectual providing for the Subject, and Letters of Reprizals, they being granted long † before the Statutes, and the King's Prerogative not the leaſt diminiſhed, but re maining at the Common Law to judge when expedi ent.

† *Johan. Reg. memb.* 22. *Pat.* 15. *Ed.* 3. *part.* 2. *dorſ.* 48.

IX. And ſince the granting of Letters of Reprizal does not, in the ordinary way, for particular ſatisfaction amount to a breach of the Peace, I have thought fit for the excellency and care that is had in the compoſing and framing of them, to recommend one that was granted upon Solemn Advice, and for the Reaſons therein mentioned.

Vide §. 15. *poſtea.*

X. The *Extraordinary* are by Letters of *Marque*, for reparation at Sea, or any place out of the Realm, grantable by the *Secretaries* of State, with the like approbation, of the King or Council, or both; but they are only during the King's Pleaſure, and to weaken the Enemy during the time of War, and may at any time be revoked.

XI. As Princes by the Laws of *Nations* are reſponſible for injuries *publick*, ſo ſhould they by the moſt prudent ways imaginable prevent thoſe that are *private*, not ſuffering Foreigners, if poſſible, to receive wrongs in their Countries: For, as the *Florentine* obſerves, *If a Man be exceedingly offended, either by the publick, or by any other private hand, in a Foreign Nation, and cannot obtain reparation according to Juſtice, he will never leave blowing the Coals, or ceaſe promoting the injury, till the flame break out into War; in which he cares not if he ſee the ruin of that Kingdom or State, when he receiv'd his wrongs.*

Machiavel on his *Tit. Liv.* C. A Prince in this latter Age loſt his Country but for a Load of Sheep Skins. *Philip Comines in vita Caroli Ducis Burgund.*

Nor ſhould the Prince or State of the Perſon injured, value his Misfortune at ſo low a Rate, as to deny him Letters of Requeſt, for that were to heap up injury upon injury; but likewiſe, if Juſtice be denied after ſuch requeſt, to arm him with power to take ſatisfaction by repriſe, *vi, manu & militari.*

Leg. qui reſtituere de rei vindicat.

Generally there always proceed Letters of Requeſt, two or three, more or leſs; and according to the ſatisfaction ſufficient or inſufficient, returned in anſwer to the ſame, Commiſſions are awarded.

XII. *Subjects* cannot by force hinder the Execution, even of an unjuſt Judgment, or lawfully purſue their right by force, by reaſon of the *efficacy* of the power over them: But *Foreigners* have a right to compel, which yet they cannot uſe lawfully, ſo long as they may obtain ſatisfaction by Judgment. But if that ceaſes, then Reprizal is let in.

Res judic. pro veritate habetur; yet it is as true, *Judex male judicans pro injuria tenetur.*

XIII.

XIII. Now Judgment is obtained either in the *Ordina* Courſe, by way of *Proſecution*, or *Suit*, or *Appeal* from tl ſame, after Sentence, or Judgment given, to a high Court; or elſe in the *Extraordinary* way, which is by wa of Supplication, or Petition to the *Supream Power*; b we muſt underſtand that to be, when the matter *in co troverſie* is, *tam quoad merita quam quoad modum procedendi* not doubtful, for in doubtful matters the preſumption ever for the Judge or Court.

Et cum per injuriam Judicis dominorem quia debitoris non fuiſſet, abſtuliſſet creditor, quaſi obligatum ſibi; & quaeritur an ſoluto debitori reſtitui eam oporteret; debitori Scaevola reſtituendam probavit, Leg. ſcripturam ff. de diſtr. pign.

But the Reprizal muſt be grounded on wrong Judg ment given in matters *not doubtful*, which might hav been redreſſed one way or other; either by the ordinar or extraordinary power of the Country or Place; an the which was apparently *perverted* or *denied*.

But if the matter be doubtful, then otherwiſe; for i Cauſes dubious or difficult, there is a preſumption alwa that Juſtice was truly Adminiſtred by them who we duly Elected to publick Judgments.

XIV. And yet in this latter Caſe, ſome *are of Opinio that if the Caſe were dubious, and if the Judgment we againſt apparent Right, the Stranger oppreſſed is let int his ſatisfaction; and the reaſon is, becauſe the Judge Authority is not the ſame over *Foreigners*, as over *Subjects* for the reaſon above-mentioned.

* *Verus debitor, licet abſolutus ſit, natura tamen debitor permanet. Paulus Leg. Julia D. de cond. indebitor.*

If an *Engliſh* Merchant ſhall proſecute a Suit in the Or dinary Courts of the Law beyond Seas, and Sentence o Judgment ſhall paſs againſt him, from which he appea to the *Supream Judgment*, and there the firſt Judgment o Sentence is affirmed, though the Complainant hath recei ved a Judgment againſt the *real Right* of the Cauſe, ye this will be no cauſe for Letters of Reprizal, though per haps it may occaſion Letters of *Requeſt* (if there be ſtron circumſtances for the ſame) to have a rehearing of th Cauſe.

But If an *Engliſh* Man ſhall recover a Debt there, an then the Officer having the Debtor in Cuſtody, will wil fully let the Priſoner eſcape, and then become inſolvent the ſame may perhaps occaſion Reprizal.

In *England*, If a Foreigner bring an Action Perſona againſt *I. S.* and the matter is found *ſpecial* or *general*, an the Party prays Judgment, and the Court refuſes it; an then the Defendant dies, and with him the Action, (th

Nulli vendemus nulli negabimus, aut deferemus juſtitiam, Grand Charter *Cok. 2 Inſt.* 56.

naturi

nature of it being ſuch) the Party is here without Remedy, the ſame may occaſion Letters of Reprizal, if it be accompanied with thoſe Circumſtances that evince an apparent denial of Juſtice, *i. e.* as putting it off from *Term* to *Term* without cauſe.

An *Engliſh* Man purſues his Right in the legal Courts beyond Seas, and the Military Governour oppoſes the proſecution, and by force conveys away the Debtor and his Goods, the Sentence or Judgment is obtained: its ultimate end being *Execution*, being thus fruſtrated, may occaſion Letters of Reprizal.

Caſe of ſlaughter, *Lee* againſt the Governour of *Leghorn* upon the Petition of *Goula* and *Canham* merchants in *Nov.* 1670. on which two Letters of Requeſt were ſent to the great Duke of *Tuſcany*, for redreſs.

XV. Perſons murdered, ſpoil'd, or otherwiſe dampnified in hoſtile manner, in the Territories or places belonging to that King, to whom Letters of Requeſt are iſſued forth, if no ſatisfaction be returned, Letters of Reprizal may iſſue forth; and the Parties Petitioners are not in ſuch caſes compelled to reſort to the Ordinary proſecution: But the Prince of that Country, againſt whom the ſame are awarded, muſt repair the damage out of his or their Eſtates, who committed the injuries; and if that proves deficient, it muſt then fall as a common Debt on his Country.

Such Letters of Requeſt generally allot a time † certain for Damages to be repair'd, if not, Reprizals to iſſue forth: A ſingular Example of which you will find hereunder.

† After the Maſſacre at *Amboyna*, and the other depredations committed by the *Flemings* on the *Engliſh*, his Majeſty in 1625. iſſued forth his Letters of Requeſt to the States of *Holland*, for Satisfaction within 18 Months, otherwiſe Letters of Reprizal. *Vide* Journals of that Year, and *Leo Aitzma p.* 48 13. 41. 82. So likewiſe Letters of Requeſt went to the King of *Spain*, requiring Satisfaction for the depredation committed on the Ship and Goods of Mr. *Stampe*, who was ſpoiled and murdered at the *Havana*, *Anno* 1674. *Vide* the Proclamation 1675. of Reward promiſed by his Majeſty for the apprehending the Offenders dead or alive.

A Copy of Letters Patents, for ſpecial Reprizals from the King of *Great Britain*, (under the Great Seal of *England*) againſt the States General and their

CHARLES the Second, by the Grace of God, of England, Scotland, France, and Ireland, King, Defender of the Faith, &c. To all Chriſtian People, to whom theſe Preſents ſhall come, GREETING: WHEREAS our loving Subject William Courten, Eſq; deceaſed, and his Partners Anno 1643. by the depredation and hoſtile act of one Gailand, Commander in chief of Two Ships belonging to the Eaſt-India Company of the Netherlands, was between Goa and Maccao in the

Subjects, inrolled in the High Court of Chancery. 19 *Maii.* 15 *Car.* 2.

Straights of Malacca, deprived and moſt injuriouſly ſpoiled of a certain Ship named the Bona Eſperanza, and of her Tackling, Apparel, and Furniture, and all the Goods and Lading in her, upon a very hopeful trading Voyage to China, which were carried to Batavia, and there all de facto without due Proceſs of Law confiſcated. And that alſo in the ſame Year another laden Ship of Our ſaid Subject, called the Henry Bonadventure, being come on Ground near the Iſland Mauritius, was there both Ship and Goods ſeized upon by ſome of the Officers and Miniſters, and others under the Command of the ſaid Eaſt-India Company, and utterly detained from the right Owners. AND WHEREAS the ſaid William Courten, and his Aſſigns in his Life time, uſed all poſſible endeavours to recover the ſaid Ships and Goods, and to procure further Juſtice againſt the Malefactours, and yet could obtain no Reſtitution or Satiſfaction, whereby they became to be much diſtreſſed and utterly undone in their Eſtate and Credit: And that thereupon, and upon the moſt humble Supplications and Addreſſes of Francis Earl of Shrewsbury, and William Courten, Eſq; Grand-Child and Heir of the ſaid Sir William deceaſed, Sir John Ayton and Sir Edmond Turner Knights, George Carew & Charles Whitaker Eſquires, on the behalf of themſelves and divers others intereſſed in the ſaid two Ships Bona Eſperanza, and Henry Bonadventure, and in the Eſtates of the ſaid Sir William Courten deceaſed, Sir Edward Littleton Baronet, & Sir Paul Pindar Knight deceaſed, that We would take their Caſe into Our Princely conſideration. WE OUT OF A JUST SENSE We then had and ſtill have of their unjuſt SUFFERINGS in that buſineſs; both by Our own Letters under OUR SIGN Manual to the States General of the United Provinces, and by Sir George Downing Knight and Baronet, Our Envoy Extraordinary, to whom We gave Eſpecial Command ſo to do, required ſatiſfaction to be made according to the Rules of Juſtice, and the Amity and good correſpondence, which We then deſired to conſerve with them firm and inviolable. AND WHEREAS after ſeveral Addreſſes made to the ſaid States-General by our ſaid Envoy, and nothing granted effectual for Relief of Our ſaid Subjects, (whom we take Our ſelves in Honour and Juſtice,

con-

concerned to be ſatisfied and repaid) We lately commanded the ſaid Sir George Downing to intimate and ſignifie to the ſaid States, that we expected their final Anſwer, concerning ſatisfaction to be made for the ſaid Ships and Goods by a time then prefixed and ſince elapſed, that We might ſo govern Our ſelves thereupon, that Our aforeſaid Subjects might be relieved according to Right and Juſtice. And yet no ſatisfactory Anſwer hath been given, ſo that We cannot but apprehend it to be, not only a fruitleſs Endeavour, but a proſtituting of Our Honour and Dignity, to make further Application, after ſo many denials and ſlightings. AND WHEREAS John Exton, Doctor of Laws, Judge of our High Admiralty Court of England, upon Our Command, to certifie to Us the Value of the Loſſes and Demages ſuſtained by the ſaid William Courten and Partners, whoſe Intereſt is now veſted in our loving Subjects, Sir Edmond Turner, Kt. and George Carew, Eſq, and Partners, hath upon full Examination and Proofs thereof made by Witneſſes in Our High Court of Admiralty, reported and certified under his hand, that the ſame do amount to the Sum of One Hundred fifty one Thouſand ſix Hundred and twelve Pounds.

NOW KNOW YE, That for a full reſtitution to be made to them for their Ships, Goods and Merchandizes, of which the ſaid William Courten, and the Aſſigns of the ſaid William Courten and Partners, were ſo deſpoiled as aforeſaid, with all ſuch Coſts and Charges, as they ſhall be at for the recovery of the ſame, We by the Advice of Our Privy Council have thought fit, and by theſe Preſents do grant Licence and Authority under Our Great Seal of England, unto our ſaid Subjects Sir Edmond Turner and George Carew, their Executors, Adminiſtrators and Aſſigns, for and on the behalf of themſelves, and other Perſons intereſſed as aforeſaid, to equipp, victual, furniſh, and to ſet to Sea from time to time, ſuch and ſo many Ships and Pinaces as they ſhall think fit. PROVIDED, always that there be an Entry made and recorded in the Admiralty Court of the Names of all Ships and Veſſels, and of their Burden and Ammunition, and for how long time they are victualled; And alſo of the Name of the Commander thereof, before the

ſame oꝛ any of them be ſet foꝛth to Sea; And with th
ſaid Ships and Pinaces by foꝛce of Arms to ſet upor
take and appꝛehend any of the Ships, Goods, Monies ar
Merchandizes of the States General, oꝛ any of the Sul
jects inhabiting within any their Dominions oꝛ Terr
toꝛies, whereſoever the ſame ſhall be found, and not i
any Poꝛt oꝛ Harbour in England, oꝛ Ireland, unleſs it b
the Ships and Goods of the Parties that did the Wrong
And the ſaid Ships and Goods, Monies and Merchandize
being ſo taken and bꝛought into ſome Poꝛt of Our Realm
and Dominions, an Inventoꝛy thereof ſhall be taken b
Authoꝛity of Our Court of Admiralty by the Judg
oꝛ Judges thereof, foꝛ the time being, upon Pꝛoofs mad
befoꝛe him oꝛ them, that the ſaid Ships, Goods, Wares
Merchandizes or Money, did belong to the States Ge
neral, oꝛ any of the Subjects as afoꝛeſaid. That the
ſhall be lawful Pꝛize to the ſaid Sir Edmond Turner an
George Carew, their Executoꝛs, Adminiſtratoꝛs an
Aſſigns as afoꝛeſaid, to retain and keep in their oꝛ an
of their Poſſeſſions, and to make Sale, and diſpoſe there
of in open Market oꝛ howſoever elſe, to their and every
of their beſt Advantage and Benefit, in as ample manne
as at any time heretofoꝛe hath been accuſtomed by way o
Repꝛizal, and to have and enjoy the ſame as lawful
Pꝛize, and as their own pꝛoper Goods: SO THAT
" NEITHER Captain, Maſter noꝛ any of the Com-
" pany, that ſhall ſerve in his own Perſon, oꝛ ſhall pꝛo-
" mote and advance the ſaid enterpꝛiſe in manner and
" foꝛm afoꝛeſaid, ſhall in any manner of wiſe be reputed
" oꝛ challenged foꝛ any Offender againſt any of Our
" Laws. And that alſo it ſhall be lawful foꝛ all manner
" of Perſons as well our Subjects, as any other, to buy
" the ſaid Ships, Goods, and Merchandizes ſo taken and
" appꝛehended by the ſaid Captains, Maſters and others,
" and adjudged as afoꝛeſaid, without any damage, loſs,
" hinderance, trouble, oꝛ moleſtation, oꝛ incumbꝛance,
" to befal the ſaid Buyers, oꝛ any of them, in as ample
" and lawful manner, as if the Ships, Goods, Wares,
" and Merchandize, had been come and gotten by the
" lawful Traffick of Merchants, oꝛ of juſt Pꝛizes in the
" time of open War. PROVIDED always, that all
Ships, Goods, and Merchandize, taken by virtue of this
Our

Our Commiſſion ſhall be kept in ſafety, and no part of them waſted, ſpoiled, or diminiſhed, or the Bulk thereof broken, until Judgment have firſt paſt as aforeſaid, that they are the Ships and Merchandizes of the States General, or ſome of their Subjects as aforeſaid. And if by colour of this our Commiſſion, there ſhall be taken any Ships, Goods, or Merchandizes of any of our loving Subjects, or the Subjects of any Prince, or State in good League, or Amity with Us (except the States-General) or their Subjects as aforeſaid, and the Goods therein laden, ſold and imbezelled or diminiſhed, or the Bulk thereof broken in any Place before they ſhall be adjudged to belong to the States General, or ſome of their Subjects as aforeſaid that then this Commiſſion ſhall be of no ſufficient Authority to take the ſaid Ships, Goods, and Merchandizes, or to warrant, or ſave harmleſs ſuch as ſhall receive, buy or intermeddle therein; but that both the Prizes ſo taken, and the ſaid Ship of War, ſhall be confiſcated to our uſe. “AND FUR-
“THER, We do hereby declare that it is our will and
“pleaſure, that this Our Commiſſion ſhall remain in
“full force and power, to all intents and purpoſes, untill
“the ſaid Sir Edmond Turner, and George Carew, their
“Executors, Adminiſtrators, and Aſſigns, as aforeſaid,
“ſhall by virtue thereof have by force of Arms appre-
“hended, taken, ſeiz'd, recovered, and received from the
“ſaid States General, or their Subjects, One hundred
“fifty one thouſand ſix hundred and twelve Pounds, ac-
“cording to the Appraiſement to be made by ſufficient
“Appraiſers upon Oath nominated and authorized in
“Our ſaid Court of Admiralty, of all ſuch Ships, Goods,
“Wares, and Merchandizes, as ſhall be taken from the
“ſaid States General, or any of their Subjects, by virtue
“of this Commiſſion, or ſhall otherways receive ſatiſ-
“faction of the Debt aforeſaid, by Compoſition to be made
“between thoſe of the Eaſt India Company of the Ne-
“therlands, and the ſaid Sir Edmond Turner, and George
“Carew, their Executors, Adminiſtrators and Aſſigns,
“as aforeſaid. NOTWITHSTANDING it ſo happen,
“the preſent Difference between Us, and the States-
“General depending upon general Reprizals, may be
“agreed and compoſed, and that in the interim a Peace

“ and good Correſpondence may be renewed between Us
“ and the ſaid States-General: In which caſe nevertheleſs,
“ It is Our Will and Pleaſure that in the Execution of
“ this Our Commiſſion no violence ſhall be done to the
“ Perſons of the ſaid Subjects of the ſaid States-General,
“ but only in caſe of reſiſtance, and that after in cold
“ Blood, the Subjects of the ſaid States General, if hurt
“ or wounded, ſhall be uſed with all convenient office of
“ humanity and kindneſs. AND FURTHER Our Will
“ and Pleaſure is, That although it ſhall happen that all
“ hoſtility between Us and the States General, and Our
“ reſpective Subjects ſhall ceaſe, yet this Our Commiſſion
“ ſhall remain, and be in full force and power, to the ſaid
“ Sir Edmond Turner, and George Carew, their Execu-
“ tors, Adminiſtrators and Aſſigns, as aforeſaid, by vir-
“ tue thereof to apprehend, take and ſeize by force and
“ Arms, ſo many more of the ſaid Ships and Goods of
“ the States-General, or any of their ſaid Subjects, as
“ beſides the ſaid Sum before mentioned ſhall counter-
“ vail, ſatisfie, and pay all ſuch Coſts and Charges as
“ the ſaid Sir Edmond Turner, and George Carew, their
“ Executors, Adminiſtrators, or Aſſigns as aforeſaid,
“ ſhall from time to time make Proof to have diſburſed
“ and paid towards the equipping, manning, paying, fur-
“ niſhing, and victualling of the ſaid Ships, ſo licenſed
“ and Authorized as aforeſaid, by this our ſaid Commiſſi-
“ on to be equipped, manned, furniſhed, and victualled by
“ the ſaid Sir Edmond Turner and George Carew, their
“ Executors, Adminiſtrators, and Aſſigns as aforeſaid, for
“ the purpoſe aforeſaid. AND OUR WILL and pleaſure
is, and we do hereby require Our Judge or Judges of Our High Court of Admiralty, for the time being, and all other Officers of the Admiralty, and all other our Judge or Judges, Officers, Miniſters, and Subjects whatſoever to be aiding and aſſiſting to the ſaid Sir Edmond Turner, and George Carew, their Executors, Adminiſtrators, and Aſſigns as aforeſaid, in all points in the due Execution of this Our Royal Commiſſion, and to proceed to adjudications, and adjudge all Ships, Merchandizes, Monies and Goods by virtue thereof to be taken according to Our Princely intention, hereby ſignified and expreſſed, and to take care that this Our Royal Commiſ-

ſion

ſion to be duly executed, and favourably interpreted and conſtrued in all reſpects, to the Benefit and beſt Advantage of the ſaid Sir Edmond Turner and George Carew, their Executors, Adminiſtrators, and Aſſigns, as aforeſaid. *IN WITNESS* whereof, We have cauſed theſe Our Letters to be made Patents. Witneſs Our ſelf at Weſtminſter, the 19th Day of May, in the Seventeenth Year of Our Reign.

BY THE KING.

XVI. It is not the place of any Man's *Nativity*, but his *Domicil*; not of his *Origination* but of his *Habitation*, that ſubjects him to *Reprize*: The Law doth not conſider ſo much where he was born, as where he lives; not ſo much where he came into the World, as where he improves the World.

If therefore Letters of Reprizal ſhould be awarded againſt the Subjects of the *Duke of Florence*, and a Native of *Florence*, (but Denizened or Naturalized in *England*) ſhould have a Ship in a Voyage for *Legborn*, if a Caption ſhould be made, the ſame is not lawful, nor can the ſame be made Prize.

XVII. Nor doth it any where appear, that *Reprizals* can be granted on Misfortunes happening to Perſons or their Goods, reſiding or being in Foreign parts in time of War there; for if any Misfortune happens, or is occaſioned to their Effects, or to their Perſons, then they muſt be contented to ſit down under the Loſs; it being their own fault, they would not fly or relinquiſh the place, when they foreſaw the Country was ſubject to the ſpoil of the Soldiers, and devaſtation of the Conqueror.

The Factions of the *Guelfs* and *Gibellins* in *Florence*, warring againſt each other. The *Guelfs* obtaing the Victory, and thruſting the *Gibellins* out of it, after they had taken the City, *Dom. cujuſdam Hugonis de Papi in hoc Regno Angliæ demorantis diruerunt*, and plundered his Goods therein, *qui Hugo ſupplicavit Domino Regi, ut Inde Itali Mercatores* (of that Faction and City then in *England*) *emendas hic ſibi facerent*; upon which *adjudicatum fuit, quod dicti Mercatores dicto Hugoni ſatisfaciant pro damnis ſuſceptis, & deſtructione domus ſuæ*: upon which a Writ of Error was brought, and the Judgment was reverſed in

Mich. 5 E. 1. Rot. 53. (in Theſaur. Recept. Regis in Scac.) coram Rege Florentiæ.

Vide Rot Vaſconiæ 28 E. 3. Rot. 7. pro Rob.

Draper & aliis Civibus Corke in Hibernia.

theſe words; *Quòd non eſt conſuetudo Angliæ de aliqua tranſgreſſione facta in aliena Regione, tempore Guerræ, vel alio modo*—*conſideratum eſt, quod totus proceſſus & ejus effectus provocentur*, &c.

Rex faciſne tu Regium Nuntium Populi Romani Quirit. vaſa comiteſq; meos. The Ambaſſador of the *Romans* being ill uſed by the *Carthaginians*, and *Scipio's* Army having ſurprized the Ambaſſadors of the *Carthaginians*, was demanded what ſhould be done to them, anſwered, not as the *Carthaginians* have done to the *Romans*.

XVIII. By right (for ſo it is now called of rendring like for like) there are many perſons exempted, and thoſe whoſe Perſons are ſo privileged, have alſo protection for their Goods, ſome by the *Laws of Nations*, ſome by the *Civil Law*, others by the *Common Law*; among which *Ambaſſadors* by the Laws of Nations, their Retinue and Goods are exempt, coming from him who awarded the Reprize, the Laws of Nations not only provided for the Dignity of him that ſends, but likewiſe the ſecure going and coming of him that is ſent.

Nor againſt thoſe that travel for Religion, nor on Students, Scholars, or their Books; nor on Women or Children by the *Civil Law*: nor thoſe that travel through a Country, ſtaying but a little while there; for they are only ſubject to the Law of the place.

By the *Canon Law* Eccleſiaſtical Perſons are expreſly exempt from Reprizals.

A Merchant of another place than that againſt which *Reprizals* are granted, albeit the Factor of ſuch Goods were of that place, are not ſubject to Reprizals.

XIX. Ships driven into Port by ſtorm or ſtreſs of weather, have an exemption from the Law of Reprizals, according to the *Jus Commune*, but by the Law of *England* otherwiſe, unleſs expreſly provided for in the Writ, or Commiſſion.

But if ſuch Ship flies from his own Country to avoid Confiſcation, or ſome other Fault, and is driven in by ſtreſs of Weather, ſhe may then become ſubject to be prize.

But it is not lawful to make ſeiſure in any Ports, but in his who awarded the Reprizal, or his againſt whom the ſame iſſued; for the Ports of other Princes or States the *Peace of them* are to be maintained.

Vita autem ſubditorum innocentium, ut ex tali cauſa obligatur, fortè creditum fuit.

XX. Ships attacqued by thoſe that have Letters of Reprize, and refuſed to be yielded up, may be aſſaulted and entred; and though it may fall out, not by intention, but by accident, that ſome of thoſe that ſo reſiſt, may happen to be ſlain, yet the Fault will lie at their own Doors,

for

for hindring the Execution of right, and that which the Law moſt juſtly approves of.

apud aliquos populos, eo nimirum quod crederent unicuiq; hominum jus vitæ plenum eſſe in ſe, & ad rem publicam potuiſſe transferri, quod minime eſſet probabile, nec ſanctiori Theologiæ conſentaneum. Grotius de Jure belli lib. 3. *c.* 7. §. 4. And ſeems to be of opinion by the Law of Charity, that the Proſecution of right for a Man's Goods, which inevitably muſt be by the Life of Man, ought to be omitted. *Lib.* 2. *cap.* 10. *Liv. lib.* 2.

XXI. This right of changing of *Dominion* is ſo odious, that in the taking of Goods, if by any poſſibility the right Owners may have Reſtitution, the ſame hath been done; and though a larger time than 24 Hours may happen between the capture and recapture, and ſo may *pernoctare* with the Captor; yet Reſtitution may be made.

Prize or not Prize is of Admiral Juriſdiction.

If a Ship be Prize or not, this ſhall be tryed in the Admiralty, and no Prohibition ſhall be granted. The Caſe was, there being War between us and *Denmark*, a Privateer of *Scotland* took a Ship as Prize being a *Daniſh* Ship, and ſhe was condemned as Prize by the Admiralty in *Scotland*. And brought her upon the Land, and S. libell'd in the Admiralty of *England*; and ſuggeſted that ſhe was not a *Daniſh* but a Ship of *London*. *p.* Curiam, In as much that the matter is Prize or not Prize no Prohibition. *Tompſon* and *Smith* 1 *Sid.* 320. 2 *Keeble* 158. & 176.

A Ship taken at Sea as Prize ſhall be tryed in the Admiralty.

One who had Letters of Marque in the late Wars with the *Dutch*, took an *Oſtender* for a *Dutch* Ship, and brought her into an Haven, and libelled againſt her as Prize, and the *Oſtender* libelled in the Admiralty againſt the Captor for damage ſuſtained, for the hurt the Ship ſuſtained in the Port, and a Prohibition was praiſed for this that the Suit is for damage done in the Port, for which an Action lyes at the Common Law, but the Prohibition was denied, becauſe the Original being a Caption at Sea, and the bringing her into Port in order to have her condemned as Prize, is but a conſequent of it, not only the Original, but alſo the conſequences ſhall be tryed there. *Turner* and *Cary cont. Neele.* 1. *Lev.* 243. 1. *Sid.* 367. 2. *Keeble* 360. 364. 1. *Vent.* 173. *Radly* and *Delbow con. Eglesfield* and *Whital* 2. *Keeble* 828. and 2. *Lev.* 25. 2. *Saun.* 259.

Raymond 473 *Hughs* againſt *Cornelius & alios.*

Barthol. in Leg. ſi quid Bello D. de cap. Ang. &

And therefore if he, who hath Letters of *Marque* or *Reprizal*, takes the Ships and Goods of that Nation, a-

gainſt

Salic. in Leg. ab hoſtibus, C. de Capt. Conſt. Gall. 20. tit. 13. Art. 24. Conſul Maris 287.

gainſt whom the ſame are awarded, and brings the ſame into a *Neuter-Nation*, the Owners may there ſeize her, or there the *Admiral* may make Reſtitution by Law, as well of the Ship's Goods to the Owners, as the Perſons captives to their former Liberty; for that the ſame ought firſt to have been brought *infra Præſidia* of that Prince or State, by whoſe Subjects the ſame was taken.

Trin. 17 Car. I. in B. R. March *Rep.* 110. 2 *Keeble* 441. *Norris a*gainſt *Bercley* 110. *Res quæ infra Præſidia perductæ nondum ſunt, quanquam ab hoſtibus occupatæ, Dominum non mutarunt, ex Gentium jure.*

And with this agrees the *Common Law*; for a *Dunkirker* having taken a *French Veſſel*, ſold the ſame at *Weymouth*, whither it had been driven before it was brought *infra Præſidia Dom. Regis Hiſp.* it was in ſuch caſe ruled, that if a Ship be taken by Piracy, or Letters of *Marque* and *Reprizal*, and is not brought *infra Præſidia* of that Prince or State, by whoſe Subject the ſame was taken, the ſame could not become lawful Prize, nor were the Owners by ſuch a Caption diveſted of their Property.

But if the Caption be by Ships of War, the Property will be immediately in the Captors, and never diveſted, unleſs afterwards *vi, manu & forti* be in Battle regained.

Vide 6 A. c. 13. §. 6, 7, 8.

XXII. Upon the ſharing the *Spoil* of the captivated Ships, regard is had to the Ships preſent, not the Captors only; (for his Reward muſt be the Encouragement of his Prince, like the *Roman Corona's*, of which there were various, according to the Atchievement of the Conqueror, in imitation of which our *Sovereign* in his Royal encouraging *Medals*, follows the Example, to his deſerving Commanders, as ſo many Enſigns to enflame Noble Souls to the performing Acts of Glory and Renown) for the profits of Prizes are to be equally divided amongſt the Ships preſent, and not ſolely to the Captor; therefore if Letters of Reprizal are granted to two Ships, and they happen both of them at Sea to meet a Prize, and the one attacks and enters her, by means of which ſhe becomes *abſolutely* the Conqueror; yet the other hath right to an equal diſtribution with the Captor both in Ship and Goods, although he did nothing in the Conqueſt: the reaſon is, *That although he miſt the opportunity of taking of her, yet the preſence of his Veſſel Armed and prepared for Battel, at the time of taking, became a Terror to the Ship that was ſo conquered.* And by the Law preſumed *ſine ejus*, that the other Ship would not or could not be ſo taken, which Law hath

Mich. 32. Eliz. Sewers and Sir *Rich. Bulkley's C. Leonard* 2. part 182.

hath paſſed the current, and approbation of the *Common Law*, as reaſonable, juſt, and equitable, and may be pretended or ſurmiſed to entitle the Party Captor to the making Reſtitution of a Moiety to his Companion then preſent.

XXIII. But if it ſhould happen, that thoſe to whom Letters of *Marque* are granted, ſhould inſtead of taking the Ships and Goods of that Nation againſt whom the ſame were awarded, wilfully take or ſpoil the Goods of another Nation in amity, this would amount to a down-right Piracy. And the Perſons offenders would for ſuch fault create a Forfeiture of their Veſſel, and the Owners muſt be for ever concluded by the ſame, notwithſtanding ſuch *Commiſſion*.

Trin. 2 *Jac. in* B. R. Rolls. *Abridg. fol.* 530. Sir *Francis Moor's* Rep. 1 *Jac.* Waltham *verſ.* Mulgar. 776.

XXIV. But that muſt be underſtood where ſuch a Caption is done in a Pyratical manner; for moſt certainly, if Letters of Reprizal are granted to a Man, and then he devolves the power to another, and the Party to whom the power is conſigned, takes the Ship and Goods of another Nation than againſt whom the ſame were awarded, but upon a violent preſumption that he made a right Caption, for that he found the Colours of ſeveral Nations in the Ship, the Mariners of ſeveral Countries, the Ship of the Built of that Country againſt whom the Letters of Reprizal were awarded, though perhaps upon a Judicial hearing the parties are reſtored to their Ship and Goods, yet the Captors are not to be puniſht *Criminaliter*, nor the Grantee of the Letters Patents *Civiliter*: and the reaſon wherefore it was no injury in the Captors to take, did ariſe from the probable cauſe which will excuſe the Captors from puniſhment; (though perhaps it will not from anſwering of the damage) but it is clear, the Grantees are excuſed from both, unleſs privy to the Caption; and the reaſon is this, for the Letters Patents do not only veſt the debt in the party, but do likewiſe give Power to the party to recover, and is a Judicial proceſs to obtain ſatisfaction *vi, manu & forti* from the Subjects of that Prince or State againſt whom the ſame are awarded: So then it will be no more than if the Creditor deliver proceſs to the Officer to take his Debtor, and he takes a wrong Perſon without the knowledge of the Creditor, this may ſubject the Officer

Stat. 4 *H.* 5. *c.* 7. 14 *H.* 4. *c.* 4.

to

to anſwer Damage to the Party taken, but not the Cr ditor.

XXV. Therefore Letters of *Marque* or *Reprizal* i ſue not without good and ſufficient Caution firſt g ven for the due obſervance thereof according to Law the tranſgreſſion of which creates a Forfeiture of th ſame.

And therefore having taken a Prize, and brought th ſame *intra Preſidia*, the Captor muſt exhibit all the Ship papers and captivated Mariners to be examined in orde to adjudication, till when Bulk ought not to be broker without *Commiſſion*, nor may the Captain of the Captoı ſuffer an imbezlement of the lading, or ſell, barter oı 3 Eliz. cap. 5. diſpoſe of any part without *Commiſſion*; for the King hath a proportion in all Prizes.

12 Car. II. called the act of Navigation. Such Goods ſo brought in are not ſubject to pay Cuſtoms.

XXVI. By the Law of *Nations*, *ipſo facto*, the Dominion of the things taken by thoſe to whom Letters of *Marque* are granted, become the Captors, till the Debt and coſts, that is, the original damage and ſubſequent charges are ſatisfied, which being done, the reſidue ought to be reſtored: So the *Venetians* uſed their equity, having taken the Ships of *Genoa*, did not ſpoil any of the lading, Greg. lib. 9. but preſerved the ſame very carefully, till the Debt was paid; which done, reſtitution was made of the things entirely, without diminution.

XXVII. When for the fault perhaps of a few, a debt becomes *National*, by reaſon of which the Goods of the Innocent become liable (if taken for ſatisfaction) whether by the Law of *England*, the party ought to have Contribution, is a queſtion moſt certain by the *Common* Fitz. N. B. fol. 162. Old N. Bre. 103. Reg. Orig. fol. 176. *Law*; where more are bound to one thing, and yet one is put to the whole Burden, the Party may have proceſs called *Contributione facienda* for his Relief: but when a debt becomes Univerſal or National, it ſeems otherwiſe: *For if one lends my Country Money, I will not call my* *Seneca Benef. cap. 19. *ſelf debtor, yet I will pay my ſhare* *: ſo it may ſeem equitable by the Laws of Charity, though not compellable by the Laws of the Land.

XXVIII. Yet when depredations have happened to Foreign Merchants, and complaint hath been made, the Kings

Kings of *England* have often iſſued forth Commiſſions to inquire of the ſame: and ſo it was done upon the Petition of ſome Merchants of *Genoa*, who complained againſt the Inhabitants of the Iſle of *Garnſey* for a depredation, in taking away and detaining their Merchandize and Goods, to the value of many thouſands of Pounds, out of a Ship wracked by tempeſt near that Iſle, by which the Commiſſioners were impower'd *to puniſh the offenders, and to make reſtitution and ſatisfaction for the damages.* *Pat. 26 E. 3. pars 1. M. 16. Dorſo.*

The like complaint was made by the Merchants of the Duke of *Britain*, of certain depredations committed by the Subjects of the King of *England*, who iſſued forth the like Commiſſion, and to give them reparation and damages for the ſame; ſo that if the Subjects of the King of *England* have had their Goods taken by way of Reprize for the ſatisfaction of ſuch debt or damage, they may have the benefit of the like Commiſſions to lick themſelves whole out of the Eſtates of the Offenders. *Pat. de An. 6. H. 5. pars 1. M. 9. Dorſo. De Cateris perſonis arreſt. & capiend.*

CHAP.

Chap. III.

Of Priſvateers or Capers.

I. *Of Privateers, whether allowable by the Laws of Nature.*
II. *Of permiſſion of ſuch by the Laws of Nations.*
III. *The occaſion of their firſt Inſtitution.*
IV. *Whether it be lawful to undertake ſuch an Employment.*
V. *Of Commiſſions general to endamage an Enemy.*
VI. *Of Commiſſions ſpecial and to Privateers, and the Immunities they claim by the ſame.*
VII. *Of the care that is obliging on the iſſuing forth ſuch Commiſſions.*
VIII. *Of proviſions made as in reference to their regulating, and eſpecially in the laſt Treaty Marine between* England *and* Holland.
IX. *Of Goods ſubject to Prize, how conſidered in reference to adjudication general.*
X. *Of the Goods conſidered in reference to adjudication, on occaſions ſpecial.*
XI. *Of the Lading made Prize, whether it draws in a Forfeiture of the Veſſel, and where otherwiſe.*
XII. *Whether Ships refuſing to yield up to ſuch, life is engaged.*
XIII. *Privateers where ſubject to puniſhment, and their Actions where occaſion a Forfeiture of their Veſſel.*
XIV. *Of things not ſubject to ſpoil.*
XV. *Conſiderations general on Privateers.*

Leg. ſervus D. de Serv. export. D D. ad Leg. ſi quis in ſervitutem. De fur. Leg. prohib. c. de Jur. Fiſci.

I. NAturally every one may vindicate his own Right, therefore were our hands given us; but to profit another in what we can, is not only lawful, but commendable, ſince nothing is more ſerviceable to Man than Man. Now there are divers obligations between Men which engage them to mutual Aid, for Kinſmen aſſemble and bring help, and Neighbours are called upon, and fellow *Citizens*; for it behoves every one, either to take Arms for himſelf, if he hath received injury, or for his Kindred, or for his Benefactors, or to help his Fellows, if they be wronged. And *Solon* taught, *That Commonwealths would be happy wherein every one would think another's injuries to be his own.* But when War is denounced, it matters not what obligations are wanting, it is enough the Nation is *injured in general*; for in that every individual is wronged, and all participate in the indignities and publick damages of his Country; to revenge or prevent which, is the duty of every member of the ſame.

Barthol. in Leg. ut vim. D. de Juſt. & Jure n. 7. & 8.

II. Since

II. Since therefore it is not againſt the *Law of Nature to ſpoil him whom it is lawful to kill*, no wonder that the Laws of Nations permitted the Goods and Ships of Enemies to be ſpoiled, when it ſuffered their perſons to be ſlain. *Cicero Offic.* 3.

III. The approbation of which in the Wars of later Ages, hath given occaſion to Princes to Iſſue forth Commiſſions to endamage the Enemy in their Commerce, and to prevent ſuch Supplies as might ſtrengthen or lengthen out War, to perſons to whom the prize or caption become abſolutely the Captors, and that to prevent the ſpare of Ships of force to be abſent from their reſpective Squadrons or Fleets.

By thoſe of *Holland* they were termed *Capers*, by the *Spaniard* they had their denomination from their reſpective parts, as *Oſtenders*, *Dunkirkers*, and the like, in *England* call'd *Privateers*; how far the Actions of thoſe, as in relation to the attacking and killing of the Enemy, or ſpoiling of their Ships and Goods are lawful, not being commanded nor hired thereto, may be a queſtion.

The Son of *Cato Cenſorinus* having ſerved as a private Soldier of pay under *Pompilius*, the Legion being disbanded, the young man was reſolved to remain with the Army, tho' but a Volunteer; *Cato* wrote to *Pompilius* the General that he ſhould give him an Oath the ſecond time, giving this reaſon, *Quia priore amiſſo jure cum hoſtibus pugnare non poterat*: *Cicero* ſets down the very Words of *Cato* to his Son, whereby he admoniſheth him not to enter into Battle; *Neque enim jus eſſe qui miles non ſit pugnare cum hoſte.* Cic. Offic. 1.

IV. By the Laws of Nations (as hath been ſaid) it is lawful for every Subject of that Nation in War to ſeize upon the Enemies Goods and Ships, as alſo to kill them; for they are, after War denounc'd by Law, lookt upon as of no account, and if reſpect be had to natural and internal Right, it ſeems granted to every one in a juſt War to do thoſe things, which he is confident within the juſt meaſure of warring, to be advantageous to the innocent party: but though there may be ſuch authority given, yet what title can they claim or appropriate to themſelves of the Ships or Goods of Enemies, (for ſurely there is nothing owing to ſuch, nor are they lawfully called to the ſame) unleſs they can ſhrowd themſelves under the protection of this, that what they do, is only to exact puniſhment from the Enemy by the common right of men.

V. Commiſſions to kill or ſpoil the Enemy are in two reſpects, either General or Special; General as in a tumult;

mult; among the *Romans* the *Conſul* ſaid, *Whoſoever would have the Commonwealth ſafe, let him follow me*; and to all particular ſubjects is ſometimes granted a Right of killing in ſelf-defence, when it is publickly expedient, as on a ſudden occaſion, and the like.

VI. Special Commiſſions are ſuch as are granted to thoſe that take Pay, and are under Orders; the not obeying of which may be puniſhed with Death, though the act ſucceeds well.

Leg. Deſertorem. D. de re milit.

C. Quando liceat unicuique Leg. 1. & 2.

Others to repair a particular damage by way of *Reprize*, the original damage being turned into a National debt, but that ſatisfied, the other determines, or elſe to thoſe who receive no pay, but go to War at their own charge; and that which is more, adminiſter at their own coſts a part of a War, by providing Ships of Force, and all other military proviſions to endamage the Enemy or their Confederates, the which are termed *Privateers*, &c. as above, to whom inſtead of pay is granted leave to keep what they can take from the Enemy; and though ſuch Licence is granted them, yet may they not convert of their own Heads to their private uſe thoſe Prizes, before the ſame have been by Law adjudged lawful to the Captors, and the Admiral had his ſhare.

VII. Nor may ſuch Privateers attempt any thing againſt the Laws of Nations, as to aſſault or endamage an Enemy in the Port or Haven, under the protection of any Prince or Republick, be he Friend, Ally, or Neuter, for the peace of ſuch places muſt be kept inviolably.

Sir *Kenelm Digby* having obtained a Commiſſion againſt the *French*, who being in the *Streights*, was every where honoured as a *Cavalier* whom the King of *Great Britain* favoured; in his Voyage he took ſome Prizes, and coming to *Algier* redeemed ſeveral Captives, whom he took aboard, and placed in the ſeveral Veſſels he had made prize of: the which he ſo effected, that in a ſhort time he became *Illuſtriſſimo* of ſix Ships of War; coming to *Cape Congare*, ten leagues from *Scandaroone*, and having ſent a Boat to deſcry the road, word being brought that there were in the road two *Venetian* Galeaſſes, with two other Galeons, two *Engliſh* Ships, and ſeveral *French* Ships, Sir *Kenelm* being ſatisfied of the Prize, reſolved to attack them the next morning, although the Admiral of

of the *Venetians* had declared himſelf Protector of the *French*, and that he would deſtroy all the *Engliſh* Ships of War that he ſhould meet, either in that *Republick*'s or *Grand Signior*'s Seas. Sir *Kenelm* notwithſtanding reſolved to engage them, and accordingly bore up to them, and the *Venetian* General weigh'd Anchor to meet him; Sir *Kenelm* before he fired, ſent a *Satty* to inform the *Venetian* of his Quality, and of his Commiſſion, *being only to endeavour to make prize of the French*, and giving him all the aſſurance poſſible of his friendſhip and reſpect to the Republick; but before the *Satty* was anſwered, the engagement was begun by the *Engliſh*, *French* and *Venetian*. This Action of Sir *Kenelm Digby* was queſtioned by the *Turk*; for that Hoſtility had been committed by the *Engliſh* in the *Grand Signior* Road, and thereupon the *Baſſa* of *Aleppo* and *Cady* of *Scandarone* made an *Avania* or *Embargoe* on the *Engliſh* Merchants, till reparation was made, for the breaking the Peace of the Port.

This matter was highly debated at the Councilboard on the complaint of *Landy* then Ambaſſadour for that Republick at *London, Anno* 1629. *Vide Hiſt. Republic. Venet fol.* 170.

VIII. In the granting of ſuch private Commiſſions there is always great care to be had and taken by caution, to preſerve the Leagues of our Allies, Neuters and Friends, according to their various and ſeveral Treaties; and therefore at this day by the late Treaty between His Majeſty and the *States* of *Holland* at *London*, before any *Privateer* or *Caper* can receive Commiſſion, the Commander is obliged to enter before a competent Judge, good and ſufficient ſecurity by able and reſponſible Men, who have no part or Intereſt in ſuch Ship, in 1500 *l. Sterling*, or 15500 *Gilders*; and when they have above an hundred and fifty Men, then in 3000 *l.* or 33000 *Gilders*, that they will give full ſatisfaction for any damage or injuries, which they ſhall commit in their courſes at Sea, contrary to that Treaty, or any other Treaty made between His Majeſty and that *State*, and upon pain of Revocation and annullity of their Commiſſions, and for anſwering of ſuch damage or injuries, as they ſhall do, the Ship is made liable.

Treaty Marine at Lond. Decem. 1. 1674. In the Commiſſion muſt always be mentioned that they have given ſuch ſecurity.

IX. If a Suit be commenced between the *Captor* of a Prize and the *Claimer*, and there is a Sentence or a *Decree* given for the party reclaiming; ſuch Sentence or Decree (upon ſecurity given) ſhall be put in execution, notwithſtanding the Appeal made by him that took the Prize, which ſhall not be obſerved in caſe the Sentence ſhall be

Art. 13.

D given

given againſt the Claimers; if torture, cruelty, or barbarous uſe happens after a Caption to be done to the Perſons taken in the Prize, the ſame ſhall *ipſo facto* diſcharge ſuch a Prize, although ſhe was lawful, and the Captains ſhall loſe their Commiſſions, and both they and the Offenders be ſubjected to puniſhment.

These Articles for their excellency are fit to be a Standard to all the Nations of *Europe*. *Art.* 14.

In hoſtium eſſe partibus, qui ad bellum neceſſaria hoſti adminiſtrat.

X. Such ſorts of Inſtruments having made a caption of Ships bound for an Enemy from Nations Neuter, or in amity with both the warring States: the lading, in order to be made Prize is reduced to theſe three ſeveral heads.

Conſulat. Maris editus eſt lingua Italica, in quem relatæ ſunt conſtitutiones Imperatorum Græciæ, &c. cujus libri tit. 276.

Firſt, Thoſe Goods that are fit to be uſed in War, under which are included Powder, Shot, Guns, Pikes, Swords, and all other inſtruments and proviſions of Armature fit to be uſed in the Field or at Sea.

The ſecond, are thoſe things that may be uſed in time of War and out of War, as Money, Corn, Victuals, Ships, and the like.

And the laſt, are thoſe Goods that are only fit for luxury and pleaſure.

XI. The firſt are accounted Prize without controverſie; *He is to be accounted an Enemy that ſupplies an Enemy with things neceſſary for the War.*

Cambden Ann. 1591. By the fourth Article of the Treaty at *Lond.* 1674. thoſe Goods that may be uſed out of War as in War (except Ships) may not upon any account be called prohibited, nor ſubject to a condemnation, except carried to places beſieged, *Art.* 4. See *John Meurſius* his *Daniſh* Hiſtory concerning the Prohibiting of Goods by thoſe Northern States. *Vide poſtea*, the Grand Prize condemned by Queen *Elizabeth* in tit. Cuſtoms, and *vide* tit. Ships of War, §. 24.

The ſecond is to be governed according to the ſtate and condition of the war; for if a Prince cannot well defend himſelf, or endamage the Enemy, without intercepting of ſuch things, neceſſity will then give a right to the condemnation. And ſo *Queen Elizabeth* did the *Hanſiatick* Fleet taken, laden with Corn for *Liſbon*, upon conſideration of the ſtate of the War, the ſame became prize.

The laſt become free, and (as we have before mentioned) according to that of *Seneca*; *I will not help him to Money to pay his Guards; but if he ſhall deſire Marbles and Robes, ſuch things hurt not others, only they miniſter to his luxury: Soldiers and Arms I will not ſupply him with; if he ſhall ſeek for Players and recreations to ſoften his fierceneſs, I will gladly offer to him: Ships of War I would not ſend him, but ſuch as are for pleaſure and oſtentation of Princes ſporting in the Sea, I will not deny.*

XII. If

XII. If a Privateer take a Ship laden wholly with counterband Goods, both Ship and Goods may be ſubjected, and made prize.

And Perſons ſo attempting to relieve an Enemy may in ſome caſes be puniſhed; but if the ſame be done by neceſſity of obedience, though the parties are much to be blamed, yet are they not to be puniſhed; and ſo it was with thoſe which relieved Sir *John Oldcaſtle* with proviſions, who being taken, were diſcharged.

But if part be prohibited Goods, and the other part is not prohibited, but ſuch as according to the neceſſity of the War ſhall be ſo deemed, the ſame may draw a conſequential condemnation of Ships, as well as lading.

If part of the lading is prohibited, and the other part is merely luxorious and for pleaſure, only the Goods prohibited become prize, and the Ships and the remainder become free, and not ſubject to infection.

By the ſeventh Article in the *Treaty* at *London*, if the Skipper will deliver out the prohibited Goods, the Ship may proceed with the reſt in their Voyage or Courſe, as they pleaſe, and the Ship ſhall not be brought into Port.

XIII. If ſuch Ships ſhall be attacked in order to an examination, and ſhall refuſe, they may be aſſaulted, like a houſe ſuppos'd to have Thieves or Pirates in it, refuſes to yield up their perſons, may be broken up by the Officer, and the perſons reſiſters may be ſlain.

Nec reus eſt mortis alienæ, inquit Auguſtinus, *qui ſui poſſeſſioni murorum ambitum circumduxit: ſi aliquis ex ipſorum uſu percuſſus intereat. Publ. Epiſt.* 154.

XIV. But if any of theſe Privateers wilfully commit any ſpoil, depredations, or any other injuries, either on the Ships of our *Friends* or *Neuters*, or on the Ships or Goods of our own Subjects, they will notwithſtanding they are not in pay, be ſubjected in ſome caſes to Death and other puniſhments, according to the demerits of their crimes, and perhaps may ſubject their Veſſel to Forfeiture.

Leg. 5. de Navicul. C. lib. 3. *Trin.* 3 *Jac. in B R. Rolls* 5. *p. Abridg. f.* 5300.

And though by the Law of Nature the Goods of Enemies are to be ſpoiled as well as their Perſons ſlain, yet ſome Goods and things ſeem exempted, and ought not to be ſpoiled, and therefore it is not lawful to land on the Territories of our Enemies, to ſpoil places dedicated to God: though *Pomponius* obſerves, when places are taken by the Enemy, all things ceaſe to be Sacred;

Pompon. Leg. cum loca D. de Religioſis.

the reaſon given is becauſe the things which are call'd Sacred, yet are they not indeed exempted from humane uſes, but are publick. *The Townſmen*, ſaith *Tacitus*, *opening their gates, ſubmitted themſelves and all they had to the* Romans, *themſelves were ſpared, the Town was fired.* Pompey *entred the Temple by the right of Victory, not as a ſuppliant, but as a Conqueror*: and though that privilege may ſeem right by the Law of War to a Sovereign, or a General, that intends a Conqueſt, yet that power may not ſeem devolved to him, whoſe Commiſſion is cautionally to endamage the Enemy only, as in reference to his commerce and proviſions of enabling them to withſtand the War: Certainly, that Conqueſt is poor, whoſe Trophies and Triumphs are made up with Roofs, Pillars, Poſts, Pulpits, and Pews, and the ſpoil of Agriculture. Hence it is, that at this day the King of *France* in *Germany* and the *Netherlands* accepts of Contributions, by which the Cities and Churches are not only ſpared, but even the Countrymen plough and ſow as quietly as if there were no Armies in their Territories at all.

Tacit. Annal. 13.

Wars and Victories for the moſtpart conſiſt in taking and overthrowing Cities, which work is not done without injury of the Gods, the walls of Cities and Temples of the Gods partake in the ſame ruine, the Citizens and Prieſts equally ſlaughtered; nor is the rapine of ſacred riches and prophane unlike: ſo many are the Sacrileges of the *Romans* as their Trophies, ſo many are their Triumphs over Gods and Nations; and then goes further, *Tot manubiæ quot manent adhuc ſimulachra captivorum deorum. Mox & bene, Quod ſi quid adverſi Urbibus accidit, eadem clades Templorum quæ & mœnium fuerant.*

Even upon the ſame Reaſon, that the Inſtruments of Husbandmen are not to be taken for a pledge by the Civil or Common Law. *Leg. exeunt. C. quæ res pign.* Coke. ſup. Littleton 47.

XV. Moſt certain, thoſe ſorts of Capers or Privateers, being Inſtruments found out but of later Ages, and it's well known by whom, it were well they were reſtrain'd by conſent of all Princes; ſince all good Men account them but one Remove from Pirates, who without any reſpect to the cauſe, or having any injury done them, or ſo much as hired for the Service, ſpoil Men and Goods, making even a Trade and Calling of it, amidſt the Calamities of a War, and driving a commerce and mart with the ſpoil, and that with as much peace and content, as if they had never heard of Tears, Blood, Wounds or Death, or any ſuch things: ſuch to expoſe their lives againſt Ships of the like kind, were both honourable and juſt, or thoſe that ſhould aid the Enemy with Goods prohibited

hibited as afore, ſuch Prizes were poſſeſſions moſt noble; but the Goods, Ships and Lives of the innocent peaceable Traders to be expoſed to rapine and ſpoil, renders them worſe than the *Roman* Lictors, by how much 'tis to kill without cauſe, Headsmen executing the guilty, they the guiltleſs.

It was a high neceſſity that enforced the *Engliſh* to commiſſionate ſuch, the number of her then Enemies covering the Sea, like the *Egyptians* Locuſts; it were well they were rejected by conſent, or if allowed of, not ſubject to Quarter, when taken by Ships of War: A Trade that St. *Paul* never heard of, when he ſaid, *Who goeth to War at his own charge?* 1 Cor. 9. 7.

CHAP. IV.

Of Piracy.

I. *Pirates what.*

II. *Of the duty incumbent on Princes and States as in reference to ſuch, and whether liable for the damages they commit.*

III. *Pirates where they hold a Society, how the ſame is eſteemed in Law, and of Equality held by them.*

IV. *Whether capable of the Solemnities of War, and Rights of Legation.*

V. *Whether capable of ſuccour by the Laws of Nations.*

VI. *Ships where liable for redemption of the Maſter remaining pledge for Ship and Lading, and where not.*

VII. *Oath given to pay a reward for redemption of a Ship from Pirates, whether the ſame ought to be performed.*

VIII. *Foreigners ſpoiled by* Engliſh *Pirates, may purſue for Juſtice within the Statute of* 28 H. 8.

IX *So where the Subjects of any Foreign Nation committing the ſame, may be puniſhed by the ſame Statute.*

X. *Piracy committed by the Subjects of a Nation in Enmity with the Crown of* England *among* Engliſh *Pirates, cannot be puniſhed by the Statute of* 28 H. 8.

XI. *Committed on the Britiſh Seas puniſhable by the Crown of* England, *and none other.*

XII. *Where committed in the Ocean, whether they may be executed without tryal, by the Law of Nature.*

XIII. *The like where the Judge refuſes to try them, or in caſe of emergency, whether Juſtice may be executed immediately.*

XIV. *Pirates attempting to rob, commit a Murder, whether all principals, or only the ſlayer, and the reſt Acceſſories.*

XV. *If the Subjects of one Foreign Nation rob another, and bring the Booty into* England, *whether the party injured may proceed* Criminaliter *for puniſhment, and* Civiliter *for reſtitution.*

XVI. *Pirates take Men, and no part of the Lading, if Piracy.*

XVII. *Where a Maſter may commit Piracy of thoſe things that are committed to his charge, and where not.*

XVIII. *Where Piracy may be, though there be nothing taken: and where Goods are taken out of a Ship, and no body in it.*

XIX. *The Captain and Crew of a Veſſel having a Commiſſion of Reprize commit Piracy, whether thoſe that imployed them ought to anſwer the damage.*

XX. *Where Goods taken at Sea amount not to Piracy.*

XXI. *Goods taken and retaken by a Friend, whether the property of the Prize is altered.*

XXII. *Of Reſtitution of Goods taken by Piracy by the Laws of* England.

XXIII. *Of Reſtitution refuſed by the Laws of* England.

Juſtifications in this by a Warrant from the Admiralty. The Admiralty muſt allow the Stat. of Limitation if pleaded.

XXIV. *Of Piracy as in reference to matters Criminal, and how puniſhable at this day by the Laws of* England.

XXV. *The Statute of* 28 H. 8. *how it operates in caſes of Piracy.*

XXVI. *Of Pardons in caſes of Piracy, Forfeitures, Corruption of Blood, and Clergy.*

XXVII. *Whether a Depredation committed in a Port within this Realm remains Robbery, at the Common Law, or Piracy by the Law Marine.*

XXVIII.

XXVIII. *Whether Clergy is allowable for a Depredation in a Port, and if Pardons touching the ſame.*
XXIX. *A Pirate arraigned and ſtanding mute ſhall have Judgment of Pain, Fort and Dure.*
XXX. *Of the operation of the Attainder in caſes of Piracy.*
XXXI. *Of Goods taken at Sea and brought to Land, whether the party is puniſhable by our Law. Stat. 11. 12. W. 3. c. 7. Piracy where and how Triable.*
XXXII. *If the Admiralty claims either an original, or a concurrent Juriſdiction, the Courts above will not intermeddle.*
XXXIII. *Satisfaction of old, how made to Perſons ſpoiled at Sea.*
XXXIV. *Perſons unjuſtly detained in cuſtody upon ſuſpicion of Piracy the Courts above on a* Habeas Corpus *may, if there be juſt cauſe, either bail or diſcharge them.*

I. A *Pirate* is a Sea-Thief, or *Hoſtis humani generis*, who to enrich himſelf, either by ſurpriſe or open force, ſets upon Merchants and others trading by Sea, ever ſpoiling their Lading, if by any poſſibility they can get the maſtery, ſometimes bereaving them of their Lives, and ſinking their Ships; the Actors wherein, *Tully* calls Enemies to all, *with whom neither Faith nor Oath is to be kept.* Againſt Pirates and ſuch as live by Robbery at Sea, any Prince hath power to make War, tho' they are not ſubject to his Government. *Grot. de jure belli & pacis. lib.* 2. *cap.* 20. §. 40.

II. By the Laws of Nature Princes and States are reſponſible for their neglect, if they do not provide Ships of War, and other remedies for the reſtraining of thoſe ſort of *Robbers*; but how far they are bound, either by the *Civil Law* or *Common Law* of this Kingdom, may be ſome queſtion: for it is agreed they are not the cauſe of the unjuſt ſpoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State ſhould ſend forth *Ships of War*, or Commiſſions for repriſe, and thoſe inſtead of taking prizes from the Enemy, turn Pirates and ſpoil the Subjects of other Friends, there has been ſome doubt, whether they ought not to make ſatisfaction to the Parties injured, in caſe the offenders ſhould prove unable; ſurely there is no more reaſon for this latter than the firſt; ſeeing Princes and States may give all their ſubjects power to ſpoil the Enemy, nor is ſuch a Permiſſion any cauſe why damage was done to our Friends, when even *private* Men, without any ſuch permiſſion, might ſend forth *Ships of War*; beſides it is impoſſible that *Princes* or *States* ſhould foreſee, whether they

If the offenders could be found, they ought to be yielded up to Juſtice; and if they have any Eſtate, the ſame ought to go towards the reparation of the damage.

Caution is commonly taken upon the giving forth of ſuch Commiſſions to

they would prove ſuch or not; nor can it be avoided, but we muſt imploy ſuch, otherwiſe no *Army* or *Fleet* could be prepared; neither are Kings to be accuſed if their Soldiers or Mariners wrong their Confederates, contrary to their commands, though they are obliged to puniſh and yield up the Offenders, and to ſee that legal reparation be made out of the Eſtate of the Pirates. If *Letters of Marque* or *Reprizal* be granted out to a Merchant, and he furniſhes out a Ship with a Captain and Mariners, and they inſtead of taking the Goods or Ships of that Nation againſt whom their *Commiſſion* is awarded, take the Ships and Goods of a Friend, this is *Piracy* *; and if the Ships arrive in *England*, or in any other of His Majeſties Dominions, the ſame ſhall be ſeiz'd, and the Owners for ever loſe their Veſſel †.

prevent the ſame, if poſſible. They are generally reſtrained by Proclamation when a War breaks forth, and commanded that none preſume to ſet forth without a Commiſſion.

* *Conſtit. Galliæ tom.* 3 *tit.* 3. *Conſtitutione Anni* 1583. *cap.* 44 *Vide etiam tom. conſtit.* 3. *tit.* 2. *conſtit. Anni* 1543. *cap.* 44. *Vide* 21. Article at the Treaty at *Breda* between *England* and *Holland*, and the 15. Article in the Marine Treaty at *London* 1674.
† *Trin.* 7. *Jac. in* B. R. 1 *Rolls Abr. fol.* 530. *Vide* Sir *Francis Moor's* Reports. 1 *Jac. Waltham verſus Mulgar.* 776.

From hence it is, that Princes and States are very cautious upon this we call *Jure Belli privati*, how they engage themſelves, or thoſe who ſeek reparation for wrongs before received; for the Perſon *injured* governs not the action, but devolves the power to ſome other hired for that particular uſe, whoſe Law is no more than this, *There is moſt right where is moſt pay or prize.* Unhappy ſtate of man, whoſe ſupport and living is maintained only by expoſing himſelf to Death, a Calling that nothing can make honeſt, but the higheſt neceſſity or pious charity. And therefore thoſe that iſſue forth ſuch ſort of *Commiſſions*, generally take Caution for their returning within a convenient time, and not to wander in that unhappy condition.

III. Though Pirates are called Enemies, yet are they not properly ſo termed; *For he is an Enemy*, ſays *Cicero*, *who hath a Commonwealth, a Court, a Treaſury, Conſent and Concord of Citizens, and ſome way, if occaſion be, of Peace and League*; and therefore a Company of *Pirates* or *Freebooters* are not a Commonwealth, though perhaps they may keep a kind of *equality* among themſelves, without which no Company is able to conſiſt; and though it is ſeldom

Leg. Hoſtes de verb. ſignif.

dom they are without fault, yet they hold ſociety to maintain *right*, and they do right to others, if not in all things according to the *Law of Nature* (which among many people is in part obliterated) at leaſt according to *agreements* made with many other Nations: or according to Cuſtom: So the *Greeks* at what time it was accounted lawful to take ſpoil at Sea, abſtained from ſlaughter and depopulations, and from ſtealing Oxen that plowed, as the *Scholiaſt* upon *Thucydides* obſerves, and other Nations living alſo upon the ſpoil when they were come home from Sea, ſent unto the Owners to redeem (if they pleaſed at an equal rate) what they were robbed of at Sea; and at this day, if a Ship hath the Emperor of *Barbary*'s protection, the Pirates of that Nation (if they ſeize) will reſtore, and if there be no protection, yet if taken within *ſight* of their Caſtles, the Prize is not abſolute; but if reſiſtance is made, and there be a Caption, ſhe then becomes the Captor's for ever, *as the price of Blood.* *Leg. Hoſtis de Captivis.*

IV. Again, Pirates that have reduced themſelves into a Government or State, as thoſe of *Algier*, *Sally*, *Tripoli*, *Tunis*, and the like, ſome do conceive ought not to obtain the Rights or Solemnities of War, as other Towns or places: for though they acknowledge the Supremacy of the * *Port*, yet all the power of it cannot impoſe on them more than their own Wills voluntarily conſent to. The famous *Carthage* having yielded to the Victorious *Scipio*, did in ſome reſpect continue, and began to raiſe up her drooping Towers, till the knowing *Cato* gave Counſel for the total extirpation; out of the Ruines of which aroſe *Tunis*, the revenging Ghoſt of that famous City, who now, what open Hoſtility denied, by Thieving and Piracy continue; as ſtinking Elders ſpring from thoſe places where noble Oaks have been fell'd; and in their Art are become ſuch Maſters, and to that degree as to diſturb the mightieſt Nations on the Weſtern Empire; and though the ſame is ſmall in bigneſs, yet it is great in miſchief: the conſideration of which put fire into the Breaſt of the aged *Lewis* IX. to burn up this neſt of Waſps, who having equipt out a Fleet in his way for *Paleſtine*, reſolv'd to beſiege it: whereupon a Council of War being called, the queſtion was, Whether the ſame ſhould be ſummoned, and carried, it ſhould not; *for it was not fit the ſolemn Ceremonies of War ſhould*

Grot. de Jure belli & pacis lib. 2. c. 18 §. 2.

* *Conſtantinople*, generally ſo called.

Fuller's Holy War *lib. 4. cap. 27.*

ſhould be laviſhed away on a company of Thieves and Pirates. Notwithſtanding this, *Tunis* and *Tripoli* and their Siſter *Algier* do at this day (though neſts of Pirates) obtain the right of Legation, and Sir *John Lawſon* did conclude a Peace between his Majeſty by the Name of the moſt Serene and Mighty Prince Charles the *Second, by the Grace of God King of Great* Britain, France, *and* Ireland, *Defender of the Faith, &c. and the moſt Excellent Signiors* Mahomet Baſhaw, the Divan of the Noble City of Tunis; Hagge Muſtapha Dei, Morat Bei, *and the reſt of the Soldiers in the Kingdom of* Tunis: and with them of *Tripoli* by Sir *John Narborough* * *by the Name of* Halil Baſhaw, Ibrahim Dey, Aga, Divan, *and Governours of the Noble City and Kingdom of* Tripoli *in* Barbary. So that now (though indeed Pirates) yet having acquired the reputation of a Government, they cannot properly be eſteemed Pirates but Enemies.

October.5.Anno 1662. But by the *Turk* in theſe words, confirmed and Sealed in the preſence of Almighty God, in our Houſe in the noble City of *Tunis*, the laſt day of the Moon *Delcadi* and the year of *Hegira* 1085.

* *Mar.* 5. 167⅞ and (afterwards, *May* 1. 1676. by the *Turks*) being the 26th. day of the Moon *Zaphire*, and the year of the *Hegira* 1087.

V. Pirates and Robbers that make not a Society, *i. e.* ſuch a Society as the Law of Nations accounts lawful, are not to have any ſuccour by the Law of Nations. *Tiberius*, when *Tacfarinas* had ſent Legates to him, he was diſpleaſed that both a Traitor and a Pirate ſhould uſe the manner of an Enemy, as *Tacitus* hath it; yet ſometimes ſuch men (Faith being given them) obtain the right of Legation, as the Fugitives in the *Pyrenean* Foreſt, and the *Banditti* at *Naples*; and *Solyman* the Magnificent, having entertained *Barbaroſſa* the famous Pirate, ſent word to the *Venetians, that they ſhould uſe him and eſteem him no more as a Pirate, but one of their own Port.*

Tacit. Annal. 3. *Caſar lib.* 3. *de Bello Civ.*

Hiſt. Republ. Venet. fol. 91.

VI. If a Ship is aſſaulted by a Pirate, for redemption of which the Maſter becomes a Slave to the Captors, by the Law Marine the Ship and Lading are tacitly obliged for his redemption by a general contribution. But if a Pirate ſhall feign himſelf ſtronded, and to decoy the Merchant Man for his relief, ſhall fire his Guns, or wave his Colours, who accordingly varies his courſe for his aſſiſtance, and the Pirate enters him, for redemption of which he becomes a Slave to the Pirate, there contribution ſhall not be made, becauſe it was his folly to be ſo decoy'd.

Leg. ad Legem Rhod. de jactu. l. 2. §. *ſi navis à Piratis redempta.*

II. By

II. By the *Civil Law* a Ranſom promiſed to a Pirate, if not complied with, creates no wrong, and the reaſon given is, for that the Law of Arms is not communicated to ſuch, neither are they capable of enjoying that privilege which lawful Enemies may challenge in the Caption of another: however this hath its meaſure; for a Pirate may have a lawful poſſeſſion, the which he cannot be denied (if injury or wrong be done him) to claim the benefit of Law, but the reaſon of that ſprings from a more noble Fountain, which is his taking a legal courſe, for by that he hath ſubmitted to the Magiſtrate, and paid obedience to the Laws in demanding Juſtice; beſides, the ſame is not done ſo much in favour of the Pirate as in hatred of him who firſt commits the wrong. *Auguſtus* the Emperor having proclaimed a reward of ten Seſterces to be given him that ſhould bring in *Coracotas* the famous *Spaniſh* Pirate, who having notice of the ſame, voluntarily comes and preſents himſelf before the Emperor, and demands the promiſed reward, and the queſtion was, whether death or the Seſterces were to be his reward: The Emperor gave Judgment, that the ſum promiſed, ſhould be paid him, for otherwiſe in taking away his life he ſhould deceive him of the ſum promiſed, which would, in effect, violate the publick Faith given to him, who of himſelf offered himſelf upon the tryal of Juſtice. *Bodin. l. 1. c. 1.*

A Pirate attacks a Merchant-Man, and enters her, for redemption of which the Maſter gives his Oath, at a time and place to pay the Pirate a Sum certain; by ſome it hath been held, that the Maſter commits not perjury, if the price promiſed for redemption be not brought according to the Oath, becauſe a Pirate is not a determinate, but a common Enemy of all, with whom neither Faith nor Oath is to be kept: but that is no reaſon for the aſſoiling of the Vow: for though the Perſon be deficient, yet the Juſt God is concerned; nor can that perſon that hath promiſed a thing, ſatisfie his Conſcience after he hath once delivered it to him, to recover it back again; for the words in an Oath, as to God, are to be underſtood moſt ſimply, and with effect; and therefore he that returned ſecretly to the Enemy, and again departed, made not good his Oath concerning his Return. *Leg. bona fide D. Expoſ.*

VIII. If

VIII. If an *Engliſh Man* commit Piracy, be it upon the Subject of any Prince or Republick in amity with the Crown of *England*, they are within the purview of the *Stat.* of 28 *H.* 8 and ſo it was held where one *Winterſon, Smith*, and others, had robbed a Ship of one *Maturine Gantier*, belonging to *Bourdeaux*, and bound from thence with *French* Wines for *England*, and that the ſame was Felony by the Law Marine, and the parties were convicted of the ſame.

On a Commiſſion grounded on the Stat. awarded. *Rott. Adm.* 28 *Eliz. m.* 23.

IX. And ſo it is if the Subject of any other Nation or Kingdom, being in amity with the King of *England*, commit Piracy on the Ships or Goods of the *Engliſh*, the ſame is Felony, and puniſhable by virtue of the *Stat.* and ſo it was adjudged, where one *Careleſs*, Captain of a *French Man* of War of about 40 Tuns, and divers others, ſetting upon four Merchant Men going from the Port of *Briſtol* to *Caermarthen*, did rob them of about 1000 *l.* for which he and the reſt were arraigned, and found guilty of the *Piracy*.

Rott: Adm. anno 28 *Eliz. m.* 24.

But before the *Stat.* of 25 *Ed.* 3. if the ſubjects of a Foreign Nation and ſome *Engliſh* had joined together, and had committed Piracy, it had been Treaſon in the *Engliſh*, and Felony in the Foreigners: And ſo it was ſaid by *Shard*, where a *Norman* being Commander of a Ship, had, together with ſome *Engliſh*, committed Robberies on the Sea, being taken, were arrained and found guilty; the *Norman* of Felony, and the *Engliſh* of Treaſon, who accordingly were drawn and hang'd. But now at this day they both receive Judgment as Felons by the Laws Marine.

Normandy was loſt by King *John*, and out of the ligeance of the King of *England*, and they were as now accounted Aliens, 42. *Aſſiſ. place* 25. *per Shard. Vid.* 2 *H.* 5. *cap.* 6.

X. If the Subjects in enmity with the Crown of *England* be Sailors aboard an *Engliſh* Pirate with other *Engliſh*, and then a Robbery is committed by them, and afterwards are taken, it is Felony without controverſie in the *Engliſh*, but not in the *Strangers*; for they cannot be tryed by virtue of the Commiſſion upon the *Statute*, for it was no Piracy in them, but the depredation of an Enemy, for which they ſhall receive a Trial by Martial Law, and Judgment accordingly.

XI. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republick, in amity with the Crown of *England* upon the *Britiſh* Seas, are puniſh-

Selden Mare Clauſ. lib. 1. *cap.* 27. *Caſe of*

Puniſhable properly by the Crown of *England* only, for the Kings of the ſame have *iſtud regimen & dominium excluſivè* of the Kings of *France*, and all other Princes and States whatſoever.

Reginor Grimbald in temper. Ed. 1. Cited in 4. *Inſt. fol.* 142. in *c.* of the Admiralty.

XII. If Piracy be committed on the *Ocean*, and the Pirates in the Attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expoſe them immediately to puniſhment, by hanging them up at the Main-yard end before a Departure; for the old natural liberty remains in places where are no Judgments.

And therefore at this Day, if a Ship ſhall be on a Voyage to the *Weſt-Indies*, or on a Diſcovery of thoſe Parts of the unknown World, and in her way be aſſaulted by a Pirate, but in the Attempt overcomes the Pirate, by the Laws Marine, the Veſſel is become the Captors; and they may execute ſuch *Beaſts of Prey* immediately, without any Solemnity of Condemnation. If we reſpect expletory Juſtice, it cannot be denied, but for the Conſervation of Ship and Goods, a Pirate invading may be ſlain, for the inequality between theſe things and life is made up in favour of the innocent, and by hatred to the injurious: Whence it follows, if we regard only that Right, that a Pirate running away with ſtolen Goods, if they cannot otherwiſe be recovered, may be ſunk. *Demoſthenes* ſaid, *It was very hard and unjuſt, and contrary both to the written Laws and the common Rules amongſt Men, not to be ſuffered to uſe force againſt him who in a hoſtile manner hath taken my Goods.*

Injicere manum parcæ traxerunt debitum ſibi, & ſermone uſus eſt juris; nam manus injectio dicitur, quoties nulla judicis auctoritate, rem nobis debitam vindicamus. Serv. Æn. 11.

Oratione in Ariſtocratem.

XIII. So likewiſe, if a Ship ſhall be aſſaulted by Pirates, and in the Attempt the Pirates ſhall be overcome, if the Captors bring them to the next Port, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loſs, Juſtice may be done upon them by the Law of Nature, and the ſame may be there executed by the Captors.

Leg. extat. D. quod metus.

Honorius & Theodoſius; idcirco Judiciorum vigor Juriſque publici tutela in medio conſtituta, ne quiſquam ſibi ipſi permittere valeat ultionem. Leg. nulli C. de Judæis.

Caius Cæſar being but a private Man purſued the Pirates, by whom he formerly had been taken and ſpoiled

by

by them, and making up to them with ſuch a Fleet as he poſſibly in haſte could get ready, attacked, burnt, and deſtroyed their Ships, and the Men he brought back to an Anchor, where repairing to the *Proconſul* to do Juſtice, and he neglecting, himſelf turned back, and there hang'd them up.

Plutarch. in Cæſar.

XIV. If a Pirate at Sea aſſault a Ship, but by force is prevented entring her, and in the attempt the Pirate happens to ſlay a perſon in the other Ship, they are all *Principals* in ſuch a Murder, if the *Common Law* hath Juriſdiction of the cauſe: but by the Law Marine, if the parties are known, they who gave the wound only ſhall be *pricipals*, and the reſt *acceſſories* *; and where they have cognizance of the principal, the Courts at *Common Law* will ſend them their acceſſory, if he comes before them †.

* *Ralph Williams* indicted for the murder of one *John Terrey*; and *Bridges*, *Black*, and others as Acceſſories. *Rot. Admir.* 28. *Eliz. M.* 24. † *Yelverton fol.* 134, 135.

XV. If a *Spaniard* robs a *French* Man on the High Sea, both their Princes being then in amity, and they likewiſe with the King of *England*, and the Ship is brought into the Ports of the King of *England*, the *French* Man may proceed *Criminaliter* againſt the *Spaniard* to puniſh him, and *Civiliter* to have Reſtitution of his Veſſel: but if the Veſſel is carried *infra Præſidia* * of that Prince, by whoſe Subject the ſame was taken, there can be no proceeding *Civiliter*, and doubted if *Criminaliter*; but the *French-Man* † muſt reſort into the Captor's or Pirate's own Country, or where he carried the Ships, and there proceed.

Res quæ intra Præſidia perductæ nondum ſunt, quanquam ab hoſtibus occupatæ, dominum non mutârunt ex Gentium jure. Grotius de Jure belli ac Pacis. c. 9. §. 16.
* *Trin.* 17 *Car. in* B. R. Marſh's Reports 110. † *Leg. Hoſtes & Leg. Latrones D. de Cap. Leg. poſtlim. à Piratis eod. Tit.*

A *Dutch-Man*, but naturalized by the Duke of *Savoy*, and living at *Villa Franca*, in his Dominions, procures a *Commiſſion* from the *States* of *Holland*, and coming to *Leghorn*, there rid with the Colours and Enſigns of the Duke of *Savoy*; the Ship *Diamond* being then in Port, and having received her lading, was afterwards in her Voyage home ſurpriſed by that Caper, and brought into *Villa Franca*, and there condemned and ſold to one *Poleman*; which Ship afterwards coming for *England*, the Plaintiffs having Notice

The Caption was in 1665. Adjudication paſſed *May* 13. 1670. upon which there was an Appeal to the Duke of *York*; but nothing came of it.

Notice, made a ſeizure, and upon Tryal Adjudication paſſed for the Plaintiffs, the original Proprietors: For tho' the Ship of War and the Captors were of *Savoy*, and carried thither; yet being taken by virtue of a *Dutch Commiſſion*, by the *Law Marine*, ſhe muſt be carried *infra Præſidia* of that Prince or State by virtue of whoſe *Commiſſion* ſhe was taken. Nor can ſuch carrying of the Enſigns or Colours of the Duke of *Savoy*, who was then in amity with the Crown of *England*, or the *Commander*, though a ſubject of that Prince, make him a Pirate, or ſubject them or thoſe to whom they have transferr'd their intereſt of the prize, any ways to be queſtioned for the ſame *Criminaliter*; for that the original *quoad* the taking was lawful, * *as one Enemy might take from another*; but *Civiliter* the ſame might be, for that the Captor had not entituled himſelf to a firm poſſeſſion †. And therefore in all caſes where a Ship is taken by *Letters of Marque or Piracy* *, if the ſame is not carried *infra Præſidia*, of that Prince or State by whoſe Subject the ſame was taken, the Owners are not diveſted of their Property, but may reſeize whereſoever they meet with their Veſſels.

Rott. Admir. in An. ſupradict.

* *Bulſtrod.* 3. *part. fol.* 28. Caſe of *Samuel Pellagy.*

† *Grotius de jure belli ac pacis. lib.* 3. *cap.* 9. §. 15. & 16.

* *Mich.* 8. *Jac. in B. R. Brownlow* 2. *part. Weſton's* C.

XVI. If a Pirate attacks a Ship, and only takes away ſome of the Men, in order to the ſelling them for ſlaves, this is Piracy by the Law Marine; but if a Man takes away a *Villain* or *Ward*, or any other Subject, and ſells them for ſlaves, yet this is no robbery by the *Common Law*.

C. 2. *Inſt.* 109. *lib.* 8. *fol.* 32. 6. *Caley's* C. but Black Mail and ſuch ſorts of taking in *Cumberland*, *Northumberland*, and *Weſtmorland* was Felony 43. *Eliz. cap.* 13.

XVII. If a Bale or Pack of Merchandiſe be delivered to a Maſter to carry over Sea to ſuch a Port, and he goes away with the whole Pack or Bale to another Port, and there ſells and diſpoſes of the ſame, * the ſame is no Felony. But if he opens the Bale or Pack, and take any thing out, *animo furandi*, the ſame may amount to ſuch a Larceny, as he may be indicted in the *Admiralty*, though it amounts not to a Piracy. Yet if ſuch a Maſter of Ship ſhall carry the Lading to the Port appointed, and after retakes the whole Pack or Bale back again, this may amount to a Piracy; for he being in the nature of a Common Carrier, the

* *ff. Nautæ Caup. l.* 1. *ſect.* 3. *Stab. Glanvil lib.* 10. *cap.* 13.

13 *Ed.* 4. 9. *Nautæ Caup. Stab. lib. ſect.* 7. *ſect. recepit.*

the delivery had taken its effect, and the Privity of the Balement is determined.

Co. 3. *Inſt.* 107, 108. 44 *E.* 3. 14. 4 *H.* 4. 2. §. *ad Leg. Rhod. de jact. l.* 2. §. *ſi navis à Piratis redempta ſit.*

XVIII. If a Pirate ſhall attack a Ship, and the Maſter for the Redemption ſhall give his Oath to pay a Sum certain; though there be no taking, yet is the ſame Piracy by the *Law Marine*; but by the *Common Law* there muſt be an actual taking, though it be but to the value of a Penny, as to a Robbery on the High-way.

14 *E.* 3. *Cor.* 115.

If a Ship ſhall ride at Anchor, and the Mariners ſhall be part in their Ship-boat, and the reſt on the ſhore, and none ſhall be in the Ship; yet if a Pirate ſhall attack her and rob her, the ſame is Piracy.

Trin. 7 *Jac. in B. R. Rolls Abridg.* 530. *Conſtit. Galliæ tom.* 3. *tit.* 3. *neſtit. anni* 1583. *c.* 44. *Vide Sir* Francis Moor's Reports Waltham verſ. Mulgar. 776.

XIX. A Merchant procures Letters of *Marque* or *Repriſe*, and then delivers the Commiſſions to perſons to endeavour a ſatisfaction; if ſuch perſons commit Piracy, the Veſſel is forfeited without controverſie: But the Merchant is no ways liable to make ſatisfaction; for though the Superiour ſhall anſwer for the Actions of his Miniſters or Servants, yet that is introduced by the *Civil Law*; but this queſtion muſt be decided by the *Law of Nations*, by virtue of which ſuch *Commiſſions* are awarded or granted, the which does exempt any Man to anſwer for the Damages of his Servants, unleſs he foreknew that they would commit ſuch a Piracy or Spoliation, or any way have abetted or conſented to the ſame, which right may be forfeited, and the *Civil Law* let in to acquire ſatisfaction: And yet in the Caſe of Sir *Edmond Turner*, and Mr. *George Carew*, who having Letters of Reprizal againſt the *Dutch*, Mr. *Carew* by Indorſement on the back-ſide of the Letters Patents did nominate and appoint one *Tyrence Byrne* to execute and perform all ſuch acts and things as by force of the Letters Patents he might lawfully do: *Tyrence Byrne* provides Ship and Crew, and being at Sea takes a certain Ship belonging to *Bruges* called the *Godelife*, and there was ſome probable cauſe of ſuſpicion, yet not enough to warrant a Condemnation: Whereupon the Owners having had ſentence of Reſtitution libell'd in the *Admiralty* againſt Sir *Edmond Turner*, Mr. *Carew* and *Byrne*, for Damages; upon which a Sentence was given againſt the Defendants, who Appealing, the Delegates confirmed the firſt Sentence.

Vide the very Letters of Reprizal in *Cap.* 2 Letters of Marque *fol.* 32.

Hill. 30, 31. *Car.* 2. at Serjeants Inn.

Vid. l. 1. *c.* 2. §. 15.

XX. But

XX. But if a Ship ſhall be at Sea and in neceſſity, if ſhe attacks another Ship, and takes out ſome Victuals, Cables, Ropes, Anchors or Sails, (eſpecially if that other Ship may ſpare them) this is not *Piracy*; but then the Party muſt pay ready Money for ſuch things, or give a Note or Bill for the payment of the value, if on this ſide the *Straits* of *Morocco*, within four Months, if beyond within twelve Months. *Leg. 2. ſect. cum in eadem: D. ad l. Rhod. Leg. quo naufrag §. quod ait. D. de incen. Leg. quemadmodum, ſect. item D. ad Leg. Aquiliam.* 27 *H.* 8. *cap.* 4. §. 4.

XXI. By the *Law Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the Attempt is conquered, the *Prize* becomes abſolutely the Captor's, ſaving the account to be rendred to the *Admiral*. And it is accounted in Law a juſt Caption of whatſoever may be got or taken from ſuch *Beaſts of prey*, be the ſame in their own or in their Succeſſors Poſſeſſion. But then an account ought to be rendred to the *Admiral*, who may (if they happen to be the Goods of the Fellow-ſubject of the Captors, or of Nations in amity with his own Sovereign) make reſtitution to the Owner, the coſts and charges, and what other things in equity ſhall be decreed to the Captor, firſt conſidered and deducted. *Per Leg. Pomponius de acqu. rei dom. Per Leg. Mulier, ea. cap. & poſt.*

XXII. By the *Statute* of 27 *Edw.* 3. *cap.* 13. if a Merchant loſe his Goods at Sea by Piracy, or Tempeſt (not being wrackt) and they afterwards come to Land; if he can make proof they are his Goods, they ſhall be reſtored to him in places *Guildable*, by the King's Officers and ſix Men of the Country; and in other places by the Lords there and their Officers, and ſix Men of the Country. If a Pirate takes Goods upon the Sea, and ſell them, the Property is not thereby changed no more than if a Thief upon the Land ſteals them and ſells them. *Godb.* 193. *Barber*'s Caſe. 27 *E* 3. *c.* 13. 3 *Bul.* 28, 29. March 110.

This Law hath a very near relation to that of the *Romans*, called *De Uſu-Captione* or the *Atinian* Law; for *Atinius* Enacted, That the Plea of Preſcription or long poſſeſſion, ſhould not avail in things that had been ſtoln; but the Intereſt which the right Owners had ſhould remain perpetual; the words of the Law are theſe, *Quod ſurreptum eſt, ejus rei æterna auctoritas eſſet*; where by *Auctoritas* is meant *Jus Dominii*. *Sigonius de Jure Rom. l.* 1. *c.* 11.

Mich. 13. *Jac. in B. R* Sir *Richard Bingly*'s Caſe 1. *Roll*'s Abridgment, *fol*. 530. *Lit.* C. 4. *Grotius de Jure belli & pacis lib.* 3. *c.* 9. *ſect.* 16.

XXIII. Yet by the *Common Law of England*, it has been held, That if a Man commit Piracy upon the Subjects of another Prince or Republick (though in League with us) and brings the Goods into *England*, and ſells them in a Market *Overt*, the ſame ſhall bind, and the owners are for ever concluded, and if they ſhould go about in the *Admiralty* to queſtion the Property, in order to Reſtitution, they will be prohibited. (*a*) *Hob.* 79.

(*a*) This is a Report of two Caſes where a prohibition was granted, becauſe the contract was made on Land and under Seal: and ſo not to the purpoſe. *Sed vide Gro. El.* 685. *Yelv.* 173. 1 *Sid.* 320, 367. 2 *Saun.* 260. 2 *Lev.* 25. 1 *Ven.* 173, 308. Where it is held that if the Admiral hath Juriſdiction of the Orig. Cauſe, the Matters depending thereon ſhall be tried in the Admiral's Court, tho' they ariſe on the Land.

In Trover for Goods of 400 *l.* value, Motion was for a Trial at Bar, the Goods being taken by a *Spaniſh* Caper, and brought into *Plymouth*, and from thence Shipt away without Condemnation, becauſe tho' *Br. Property* 38. ſays the Property is altered by the Enemy's poſſeſſion above 24 hours, which is good when they are brought into ſafe Port of an Enemies Country, yet the conſtant Opinion of the *Civilians* and the Practice at *Guildhall* in the *Dutch* War, is that if ſuch Goods be brought into a Neutral Port, or, as theſe were into a Friend's, the Property is not altered till Condemnation, and theſe Goods were taken from a *French* Man in League with us, which is ſtronger, and this being matter of Evidence, tho' the Defendant was only a Factor in *England* could not condemn the Goods, but the condemnation was in *Holland*, whither they were Shipt; yet the Tryal at Barr was granted. 3. *Keeble* 397. *Verdale con. Marten.* Like Caſe *Radley* and *Delbow* againſt *Eglesfield & alſ.* Laws of the Sea 426.

Several Perſons were Owners of a Ship, which they ſent to the *Indies* to Merchandize, upon the High Sea the Mariners and Reſidue commit Piracy. Upon the Return of this Ship to the River of *Thames* the Admiral ſeiz'd her, as *Bona Pyratarum*, the Merchants took the Sails and Tackle out of the Ship. The Admiral ſhall not have the Goods ſtoln from other Men, but the Owner ſhall have them. 1. *Rol. Rep.* 285. the Caſe of *Hildebrand* and others.

XXIV. This offence was not puniſhable by the *Common Law*, as appears by the Preamble of the *Stat.* of 28 *H.* 8. *cap.* 15. but the ſame was determined and judged by the *Admiral*, after the courſe of the *Civil Law*; but by force of the ſaid *Act*, the ſame is inquired of, heard, and deter-

termined according to the courſe of the *Common Law*, as if the offence had been committed on *Land*.

Stat. 11. and 12. *W.* 3. *cap.* 7. All Piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creeks, or Place where the Admiral hath *Juriſdiction*, may be tryed at Sea, or upon the Land, in any of his Majeſties Iſlands, Plantations, Colonies, *&c.* appointed for that purpoſe by Commiſſion under the Great Seal of *England*, or Seal of the Admiralty directed to ſuch Commiſſioners as his Majeſty ſhall think fit, who may commit ſuch Offenders and call a Court of Admiralty thereupon to conſiſt of 7 Perſons at the leaſt. Tryal of Piracy

And for want of 7, then any 3 of the Commiſſioners may call others as therein is mentioned.

The Perſons ſo aſſembled may proceed according to the courſe of the Admiralty, and give Sentence of Death and award execution of the Offenders, who ſhall thereupon ſuffer Loſs of Lands, Goods and Chattels.

The Regiſter of the Court, or if none be, the Preſident to take Minutes of the Proceedings and tranſmit the ſame to the Admiralty Court in *England*.

If any natural born Subjects or Denizens of *England* commit Piracy or any act of Hoſtility againſt any of his Majeſty's Subjects at Sea under Colour of a Commiſſion or Authority from any Foreign Prince or State or Perſon whatſoever, ſuch Offenders ſhall be adjudged Pyrates.

If any Commandor or Maſter of a Ship, a Sea-man or Mariner turn Pirate, or give up his Ship, *&c.* to Pirates, or combine to yield up, or run away with any Ship, or lay violent Hands on his Commander, or endeavour to make a Revolt in the Ship, he ſhall be adjudged a Pirate and ſuffer accordingly.

All Perſons who after the 29th of *September* 1700 ſhall ſet forth any Pirate (or be aiding and aſſiſting to any ſuch Pirate) committing Piracy on Land or Sea, or ſhall conceal ſuch Pirate, or ſhall receive any Veſſel or Goods, Piratically taken, ſhall be adjudged Acceſſory to ſuch Piracy, and ſuffer as Principals, according to he State of 28 H 8. which is hereby declared to be in force. When any *Engliſh* Ship ſhall have been defended by

Fight againſt Pirates, and any of the Officers or Seamen killed or wounded, the Judge of the Admiralty or his Surrogate in *London*, or the Major, or chief Officer in the Out-Ports, aſſiſted by 4 Subſtantial Merchants, may by Proceſs out of the ſaid Court levy upon the Owners of ſuch Ships, *&c.* a Sum not exceeding 2 *l. per Cent.* of the Value of the Freight, Ship and Goods ſo defended, to be diſtributed among the Officers and Seamen of the ſaid Ships, or Widows and Children of the ſlain:

A Reward of 10 *l.* for every Veſſel of 100 Tuns or under, and 15 *l.* for every Veſſel of a greater Burden ſhall be paid by the Captain, Commander or Maſter, to the firſt Diſcoveror of any combination for running away with, or deſtroying any ſuch Ship at the Port where the Wages are to be paid.

The Commiſſioners aforeſaid ſhall after the 29th of *September* 1700. have the ſole power of trying the ſaid Crimes, and Offences within the Colonies and Plantations in *America* governed by Proprietors, or under Grants or Charters from the Crown, and may iſſue their Warrants for apprehending ſuch Pirates, *&c.* and their Acceſſories in order to their being tried there, or ſent into *England.*

Commiſſions for Tryal of the ſaid Offences ſent to any Place within the Juriſdiction of the Cinque Ports, ſhall be directed to the Lord Warden of the Cinque Ports, or his Lieutenant, and ſuch Perſons as the Lord Chancellor ſhall appoint; and the Tryal to be by the Inhabitants of the Cinque Ports.

All Seamen, Officers and Sailors who ſhall deſert the Ships or Veſſels, wherein they are hired for a Voyage ſhall forfeit their Wages.

If any Maſter of a Merchant Ship or Veſſel ſhall after the 29th *September* 1700. during his being abroad force any Man aſhoar, or wilfully leave him behind, or refuſe to bring all his Men home again, who are in a Condition to return, he ſhall ſuffer 3 Months Impriſonment.

XXV. This Act does not alter the Offence, or make the Offence Felony, but leaves the offence as it was before this Act, *viz.* Felony only by the *Civil Law*, but giveth a mean of Tryal by the *Common Law*, and inflicteth pains

Coke 3. Inſtit. in Admir.

pains of Death, as if they had been attainted of any Felony done upon the Land. The Indictment muſt mention the ſame to be done upon the high *Sea*.

XXVI. A Pardon of all Felonies does not extend to this Offence, but the ſame ought *eſpecially* to be named; and tho' there be a Forfeiture of Lands and Goods, yet there is no *corruption* of Blood, nor can there be an *Acceſſory* of this Offence, tryed by virtue of this *Statute*; but if there be an Acceſſory upon the Sea to a Piracy, he muſt be tryed by the *Civil Law*.

Moore 756. *Dy.* 308. But if the Party be attainted before the Admiral, and not before the Commiſſioners, then there is no corruption of Blood or forfeiture of Lands; *quod nota.*

The *Statute* of 35 *H.* 8. *cap.* 2. taketh not away this *Statute* for *Treaſons* done upon the Sea, nor is *Clergy* allowable to the Party on the *Statute* 28 *H.* 8. *vide* 14 *Jac. in B. R. Moore* 756. *plac.* 1044. 3 *Inſt.* 112.

XXVII. Though a Port be *Locus publicus uti pars Oceani*, yet it hath been reſolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus*.

1 *Inſt.* 391. *vid. poſtea* ſ. 29.

If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirate aſſaults him and robs him, this is not *Piracy*, becauſe the ſame is not done *ſuper altum Mare*; but this is a down right Robbery at the *Common Law*, for that the Act is *infra corpus Comitatus* and was inquirable and puniſhable by the *Common Law*, before the *Statute* of 28 *H.* 8. *cap.* 15.

Hyde and others robbed the Ship of Captain *Slue*, of the Merchandize of one Mr. *Moſs*, a Merchant in *London*; and they were indicted for it at the Common Law, and were found guilty of the ſame, *Anno* 22 *Car.* 2. at the *Old Baily*.

XXVIII. So if ſuch a *Piracy* or Robbery be made in a *Creek* or *Port*, in ſuch caſes it has been conceived, that *Clergy* is allowable upon the *Statute* of 28 *H.* 8. but if it be done *ſuper altum Mare*, there no *Clergy* is allowable; howbeit, if ſuch a Robbery be committed on great Rivers within the Realm, which are lookt upon as common High-ways, there perhaps *Clergy* may not be granted, and ſo it was rul'd in the aforeſaid Caſe of *Hyde*, who with a parcel of Men, came one Night in a Boat in the River of *Thames*, and under the Colour of Preſs-Maſters, Boarded the Ship of one Captain *Slue*, and rob'd her, and for which being taken and tryed at the *Old Baily*, by the greater Opinion of the Judges there preſent, 22 *Car.* 2.

Sir *Fran. Moore* 756. 1. *Jac. Par.* 1044. And the ſame was ſo ruled by the opinion of Sir *Lyonel Jenkins*, and the reſt of the Lords the Judges, upon the Piracy committed by *Cuſack* and others; and he was afterwards execu-

ted *Anno* 1674. *vide* 19 E. 3. *Cor.* 124. 9 H. 4. 2. *Mo.*756. 1 *Inſt.* 191. *Dy.* 308. 2. had *Clergy* denied him. By the Pardon of all Felonies, at the *Common Law*, or by the *Statute-Law*, *Felony ſuper altum Mare* is not pardonable; for though the King may pardon this Offence, yet being no Felony in the eye of the Law of this Realm, but only by the *Civil Law*, the Pardon of all Felonies generally extends not to it; for this is a ſpecial Offence, and ought eſpecially to be mentioned.

XXIX. One *Cobbam* was arraigned in *Southwark*, before the Commiſſioners of Oyer and Terminer, for a Piracy and Robbery committed on a *Spaniard*, *& Stetit mutuus & noluit directe reſpondere*; And it being moved by the Attorny General, whether he ought to have the Judgment of *pain fort & dure* in this Caſe, *Saunders* Chief Baron, *Brown* and *Dyer* were of Opinion he ſhould, and that by the Words and reaſonable Intendment of the Statute of 28 *H.* 8. *c.* 15. and according to the Opinion *ſupra*, the Judgment was given by *Carus* Serjeant. *Dy.* 241. *pl.* 49.

9 E. 4. 28. cited in *Coke's* 3. *Inſtit. fol.* 112. XXX. A Man attainted by virtue of that Statute, forfeits his Lands and Goods, yet there works *no corruption* of Blood, by virtue of that Attainder; nor can there be any Acceſſory of Piracy by the Law of this Realm; but if it falls out that there is an Acceſſory upon the Sea, ſuch Acceſſory may be puniſhed by the *Civil Law*, before the Lord *Admiral*, but he cannot be puniſhed by virtue of this Act, becauſe it extends not to Acceſſories, nor makes the Offence Felony.

28 *Eliz. Butler's* Caſe cited 3. *Inſtit. fol.* 113. XXXI. If one ſteals Goods in one County, and brings them into another, the Party may be indicted in either County; but if one commits Piracy at Sea, and brings the Goods into a County in *England*, yet he cannot be indicted upon the Statute, for that the original taking was not Felony, whereof the *Common Law* took cognizance.

Marſh's Caſe 13. *Jac. in B. R.* 3 *Bulſtrod f.* 27. XXXII. If a Man is taken on ſuſpicion of *Piracy*, and a Bill is prefered againſt him, and the *Jury* find *Ignoramus*; if the Court of *Admiralty* will not diſcharge him, the Court of *King's Bench* will grant a *Habeas Corpus*, and if there be good Cauſe, diſcharge him or at leaſt take Bail for him: But if the Court ſuſpects that the Party is guilty, perhaps they may remand him; and therefore in all caſes, where the *Admiralty* legally have an original, or a

concurrent Juriſdiction, the Courts above will be well informed before they will meddle.

Treſpaſs for breaking a Ship, and taking away the Sails; the Defendant juſtified by warrant out of the Admiralty, by which he entred the Ship and took away the Sails. Objection the breaking is not anſwered, *per Curiam* its good enough, for the entry is a breaking in Law, as *Clauſum fregit* &c. And that he may carry away the Sails, becauſe this is the manner of their proceedings, and grounded upon Reaſon, becauſe the Ship cannot be kept ſafe, if the Sails be not carried away. *Creamer* againſt *Tokely Latch*, 188. *Juſtification in Treſ. by warrant of the Admiralty.*

Suit in the Admiralty the Defendant pleaded the Statute of Limitation, if that Court deny the Plea, Prohibition will be granted, or if they do receive the Plea, but will not give Sentence accordingly, Prohibition will go. *Hardres* 502. *Berkly* and *Morris*. Statute of Limitation pleadable there.

If a Man be in cuſtody for Piracy, if any aids or aſſiſts him in his Eſcape, though that matter is an Offence at Land, yet the *Admiralty* having Juriſdiction to puniſh the principal, may have likewiſe power to puniſh ſuch an Offender, who is lookt upon *quaſi* an Acceſſory to the Piracy; but to reſcue a Priſoner from an Officer of theirs, they may examine the cauſe, but they cannot proceed criminally againſt the Offender. *Yelverton* 134. 135. *Scading*'s Caſe, *Tench verſus Harriſon* B. R. Stiles 171, 340.

XXXIII. Anciently when any Merchants were robbed at Sea, or ſpoiled of their Goods, the King uſually iſſued out *Commiſſions* under the *Great Seal* of *England*, to enquire of ſuch depredations and robberies, and to puniſh the parties; and for frauds in Contracts, to give Damages to the Parties, and proceed therein *ſecundum Legem & conſuetudinem Angliæ*, *ſecundum Legem Mercatoriam*, & *Legem Maritimam*; all three Laws included in the *Commiſſions*. 50 *Eliz*. 3. *par*. 2 *Dorſ*. 24. *de audiend. & terminand. Mercatoribus ſuper mare depradatis. Pat*. 6. *E*. 1. *m*. 24. *Dorſ*. the Caſe of *Will. de Dunſtaple*, a Citizen of *Winton*. *Pat*. 32 *E*. 1. *m*. 4. *Dorſ*. *pro Willielmo Perin & Domengo Perez Mercatoribus*.

XXXIV. The Courts of *Weſtminſter* have a Sovereign power to enquire after the Liberty of every Man, and that he ſhould not be deprived of the ſame without juſt cauſe; and therefore as in other Capital cauſes, ſo likewiſe in this they may ſend their *Habeas Corpus* to remove the Body *Paſch*. 13. *Jac*. in *B. R*. King *verſ*. *Marſh*. *Bulſtrod*. 3 *par*. *fol*. 27.

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dy of any committed upon ſuch an account, and if they ſee a juſt cauſe, they may either bail, or diſcharge, or remand, as the matter ſhall ſeem juſt before them.

Coke 3 Inſtit. fol. 113. *Seſſ Admir. Feb 18.1680. Caſe of Compton Gwyther. & al.

And altho' the Statute of 28 *H.* 8. *c.* 15. does not alter the offence, or make the offence Felony, but leaveth the offence as it was before that Statute. (*viz.*) Felony only by the *Civil Law*, and gives a mean of Trial by the *Common Law*, and inflicted ſuch pains of death as if they had been attainted of any Felony; yet it was reſolved * by all the Judges, and the reſt of the Commiſſioners then preſent, that his Majeſty having granted Letters of Reprizal to Sir *Edmond Turner* and *George Carew*, againſt the Subjects of the *States General* of the *United Provinces*, and that afterwards that Grant was called in by Proclamation, then mortified in the Treaty of *Breda*, and afterwards ſuperſeded under the the Great Seal: That *Carew* (without *Turner*) having deputed ſeveral to put in Execution the ſaid Commiſſion, who accordingly did; and being indicted for Piracy, the ſame was not a Felonious and a Piratical Spoliation in them, but a Caption in order to an Adjudication; and tho' the Authority was deficient, yet not being done by the Captain and his Mariners, *animo deprædandi*, they were acquitted.

The Method to be obſerved by her Majeſties Men of War, and Privateers in examining and ſecuring Priſoners taken on board Privateers and Pirates, *&c.* by an order in Council of his late Majeſty *Will.* III. *Feb.* the 3d. 1694.

CHAP.

CHAP. V.

The Right of the Flag, as to the acknowledging the Dominion of the Britiſh Seas.

I. *Conſiderations general as in reference to the ſame.*
II. *Whether Princes may have an excluſive Property in the Sea.*
III. *That ſuch an excluſive Dominion may be, and proved.*
IV. *Of the Sea, whether capable of Diviſion as the Land.*
V. *Conſiderations general, as in reference to Maritime Cities touching Sea Dominion.*
VI. *Of the Sea, by reaſon of its inſtability, whether capable of ſubjection.*
VII. *Of the Dominion of the* Britiſh *Sea aſſerted long before, and ever ſince the Conqueſt of this Iſle by the* Romans.
VIII. *The Duty of the* Flag, *but a conſecutive Acknowledgement of that Right, and of the Ordinance of* Haſtings *declaring that Cuſtomary obeiſance.*
IX. *Conſiderations had on ſome Treaties, in reference to aſſerting the Duty of the* Flag.
X. *Of the extent how far that duty is required and payable.*
XI. *Of the duty of the* Flag, *not a bare Honorary ſalute, but a Right.*
XII. *Of the importance and value of the ſame, as well in Nations Foreign, as in* England.
XIII. *Of the effects of ſuch a Right and Sovereignty. Of the extent Of this Dominion by the Laws of* England.
XIV. *Of the Duty of the* Flag *not regarded as Civility, but commanded as a Duty.*
XV. *Of the importance of that acknowledgement.*

I. AFter the Writings of the *Illuſtrious Selden*, certainly it's impoſſible to find any *Prince* or *Republick*, or ſingle Perſon indued with Reaſon or Senſe, that *doubts* the *Dominion* of the *Britiſh Sea*, to be entirely ſubject to that *Imperial Diadem*, or the *duty* or *right* of the *Flag*, which indeed is but a *conſecutive* Acknowledgement of that ancient *Superiority*: Yet there have not been wanting ſome, who though they have not queſtioned the former, have highly *diſputed* the latter.

But there are ſome fatal Periods amongſt our *Northern Regions*, when the Inhabitants do become ſo brutal and prejudicate, that no obligation of Reaſon, Prudence, Conſcience, or Religion can prevail over their Paſſions, eſpecially if they become the devoted *Mercenaries* of an implacable *Faction* †, in oppoſition to all that can be called

† *Loveſtein.*

led either juſt or honourable; we need not rip up the Carriage of that late inſolent Son of a *Tallow-Chandler*, whoſe Deportments made him no leſs inſupportable at home, than he was amongſt *Foreign Princes*; the teſtimonies of his greateſt Parts and abilities being no other than Monuments of his *Malice* and *Hatred* to this Nation, and Records of his own *folly*. But Princes are not to be wrangled out of their ancient *Right* and *Regalities* by the ſubtil Arguments of *Wit* and *Sophiſtry*; nor are they to be ſupplanted or overthrown by Malice or Arms, ſo long as God and good Men will aſſiſt, in which his Sacred Majeſty did not want, when he aſſerted his Right with the Blood and Lives of ſo many Thouſands that fell in the diſpute.

II. That Princes may have an *excluſive property in the Sovereignty of the ſeveral parts of the Sea, and in the paſſage, Fiſhing and Shores*, is ſo evidently true by way of fact, as no man that is not ſo deſperately impudent can deny it: the Conſiderations of the general *practice* in all Maritime Countries, the neceſſity of *Order* in mutual Commerce, and the *Safety* of mens perſons, goods, and lives hath taught even the moſt *Barbarous Nations* to know by the Light of *humane Reaſon*, that *Laws* are as equally neceſſary for the Government and Preſervation of the Sea, as thoſe that negotiate and trade on the firm Land; and that to make *Laws* and to give them the *Life* of Execution, muſt of neceſſity require a *Supream Authority*; for to leave every part of the Sea and Shores to an *Arbritrary and promiſcuous Uſe*, without a correcting and ſecuring Power in caſe of wrong or danger, is to make Men in the like Condition with the Fiſhes, where the greater devour and ſwallow the leſs.

III. And though the Sea is as the *High-way*, and common to all; yet it is as other *High-ways* by Land or great Rivers are, which though *Common* and *Free*, are not to be *uſurped* by private Perſons to their own entire Service, but remain to the uſe of every one: Not that their Freedom is ſuch, as that they ſhou'd be *without Protection or Government* of ſome Prince or Republick, but rather not *exclude* the ſame; for the true Enſign of Liberty and Freedom is *Protection from thoſe that maintain it in liberty*.

See that Plea of *Chiozzola* for the *Venetian* Sovereignty of the *Adriatick* Sea, at the end of Mr. *Selden*.

IV. And

IV. And as the Sea is capable of Protection and Government, ſo is the ſame no leſs than the Land ſubject to be divided amongſt Men, and *appropriated to Cities and Potentates*, which long ſince was ordained of *God* as a thing moſt natural: whence it was that *Ariſtotle* ſaid, *That unto Maritime Cities the Sea is the Territory, becauſe from thence they take their ſuſtenance and defence*; a thing which cannot be, *unleſs part of it* might be *appropriated* in the like manner as the *Land* is, which is divided betwixt Cities and Governments, not by equal Parts, or according to their Greatneſs, but according as they *are able to rule, govern, and defend them*: *Berne* is not the greateſt City of *Switzerland*; yet ſhe hath as large a Territory as all the reſt of the Twelve *Cantons* put together: The Cities of *Noremberg* and *Genoa* are very rich and great, yet their Territories hardly exceed their Walls: and *Venice* the Miſtreſs and Queen of the *Mediterranean*, was known for many Years to be without any manner of Poſſeſſion on the firm Land.

V. Again on the Sea, certain Cities of great force have poſſeſſed large quantities thereof; others of little force have been contented with the next Waters.

Neither are there wanting Examples of ſuch, as notwithſtanding they are Maritime, yet having fertile Lands lying on the back of them, have been contented *therewith* without ever attempting to *gain any Sea-Dominion*; others who being *awed* by their more mighty Neighbours, have been conſtrained to *forbear* any ſuch attempt; for which two cauſes a City or Republick, though it be *Maritime*, yet it may remain without any *poſſeſſion of the Sea*. God hath inſtituted *Principalities* for the maintenance of Juſtice to the Benefit of Mankind; which is neceſſary to be executed as well by Sea as by Land: S. *Paul* ſaith, that for this cauſe there were due to Princes, *Cuſtoms and Contributions*.

The ſubſtance of what was alledged by the *Hanſiatique* Towns, at the *Venetians* aſſerting of the Sovereignty of the *Adriatick*, *Inter res communes, uti ipſe Imperator numerat mare, & ideo nemo in mari piſcari, aut navigare prohibetur, & adverſus inhibentem competit actio injuriarum, l. 10. ſi quis in mare, l. injuriarum, ſect. ult. de injuriis. Sin littora quoque communia ſunt l. 2. re divirſ. Quia acceſſorium ſunt maris, & acceſſorium ſequitur naturam Principalis, l. 4. de peculio. legat. c. acceſſorium de reg. jur. in 6. Ad littus maris igitur accedere quivis poteſt, non piſcandi tantum gratia, ſed etiam ædificandi & occupandi cauſa l. quod in litt. de acquirrer. Dom. l. in litt. ff. ne quid in loc. pub. Jo. Angelius J. C. de repub. Hanſiat. par. 6. fol. 85. Edit. Francof. An. Dom.* 1641. But theſe arguments were eaſily anſwered by the *Venetian* Lawyers; *Quemadmodum communio litterum reſtrin-*

ſtringitur ad populum, à quo occupata ſunt, lib.3. ſect. littera. D. de quid in loc. pub. Ita etiam communio maris: adeo ut per mare à nemine occupatum navigatio ſit omnino libera: per mare autem occupatum ab aliquo Principe ii liberam habeant navigationem qui ſunt illi Principi ſubjecti; alii verò eatenus, quatenus idem Princeps permittit. Julius Pacius de Dom. maris Adriatici.

It would be a great abſurdity to praiſe the well Govemment and defence of the Land, and to condemn that of the *Sea*; nor doth it follow, becauſe of the vaſtneſs of the *Sea*, that it is not poſſible to be governed and protected; but that proceeds from a *defect in Mankind*; for Deſarts, though part of Kingdoms, are impoſſible to be governed and protected, witneſs the many Deſarts in *Africk*, and the immenſe vaſtities of the *New World*.

VI. As it is a gift of God, that a *Land* by the Laws and publick Power be ruled, protected, and governed: ſo the ſame happens to the *Sea*; and thoſe † are deceived by a groſs equivocation, who averr that the *Land*, by reaſon of its *ſtability*, ought to be ſubjected, but not the *Sea*, for being an unconſtant *Element*, no more than *Air*; foraſmuch as they intend by the *Sea* and the *Air* all the parts of the fluid *Elements*, it is a moſt certain thing, that they cannot be brought under *Subjection* and *Government*, becauſe whilſt a Man ſerves himſelf with any one part of them, the other eſcapes out of his *power*; but this chanceth alſo to *Rivers*, which cannot be detained: but when one is ſaid to rule over a *Sea* or *River*, it is underſtood not of the *Element*, but of the *Site* where they are placed: the Waters of the *Adriatick* and *Brittiſh Seas* continually runs out thereof, and yet is the ſame *Sea*, as the *Tyber*, *Poe*, *Rhyne*, *Thames*, or *Severn*, are the ſame *Rivers* they were a Thouſand Years ſince; and this is that that is ſubject to Princes by way of *Protection* and *Government*.

† Grotius mare liberum. Communio parit diſcordiam: quod communiter poſſidetur, vitio naturali negligitur: Habet communio rerum gerendarum, difficultatem Leg. pater. §. dulciſſime. Leg. 2.

Again, it would ſeem ridiculous if any Man would aſſert that the Sea ought to be left without Protection, ſo that any one might do therein well or ill, robbing, ſpoilling, and making it unnavigable, or whatſoever ſhould ſeem fitting in their Eyes; from all which it is apparent, that the *Sea ought to be governed* by thoſe to whom it moſt properly appertains by the Divine Diſpoſition.

VII. When * *Julius Cæſar* firſt undertook the Invaſion of this *Iſle*, he ſummoned the neighbouring *Gauls* to inform him of the *Shores*, *Ports*, *Havens*, and other things

** Qui omnia fere Calli ſerant incognita, neque enim temere*

convenient

convenient that might accelerate his intended *Conqueſt*, but from them nothing could be had, they anſwering, All commerce and Traffick, and viſiting their Ports, was *interdicted to all Nations before licence had*; nor could any but Merchants viſit the ſame, and then had they places † aſſigned them whither they ſhould come; nor was this Dominion that the *Britains* then uſed, commanded without a *Naval Force*; the ſight of which when *Cæſar* ſaw, he preferred them before thoſe of the *Romans*: For upon that occaſion it was that *Cæſar*, having ſeen thoſe *Auxiliary Squadrons*, which the *Britains* ſent the *Gauls* in their Expeditions againſt the *Romans*, took occaſion to find out that Warlike People, whoſe bare Auxiliary Aid ſhook the Flower of the *Roman Squadrons*.

præter mercatores adit ad illos quiſquam, neque eis ipſis quidquam præter oram maritimam atque eas regiones quæ ſunt contra Galliam notum eſt. Com. Gall. Bell. lib. 4. fol. 72. n. 8.

† *Gauls* Town near *Yarmouth* being then, as is conceived, one of the common places of Mart or Commerce for the *Gauls*. *Quod omnibus fere Galli hoſtibus noſtris inde ſubminiſtrata auxilia intelligebat.*

And when the *Romans* became *Conquerors* of this *Iſle*, the ſame *Right* or *Dominion* was during all their time, ſupported and maintained when they ſailed round their new atchieved *Conqueſts* in the time of *Domitian*, *Agricola*, giving terror to all the neighbouring *Nations*. *Tacit. in vita Agricol.*

But when that *Mighty Empire* became ſubject to Fate, and this *Nation* by the continual ſupply of Men, which went out of the Kingdom to fill up the Contingences of the *Roman* Legions, became at laſt ſo enfeebled as to render us a Prey to the *Saxons*; which Empire having ſettled Peace with their *Daniſh* Neighbours, and quieted their own home-bred Quarrels; and having reduced the ſeveral petty Kingdoms of their *Heptarchy* under one *Diadem*, they forgot not to aſſume their ancient *Right and Dominion of the Seas*; as did the moſt Noble *Edgar* †, who kept no leſs a Number than 400 *Sail of Ships* to vindicate and aſcertain his *Dominion*, giving Protection to the peaceable, and puniſhment to the offenders: nor did his Succeſſors *Ethelred*, *Canutus*, *Edmond*, and others that followed of the *Daniſh Race*, any ways wave, relinquiſh or loſe that Royalty, but obſequiouſly maintained the ſame down to the *Conqueror*, and from him ſince for upwards of 1200 years in a quiet and peaceable Poſſeſſion.

† *Altitonantis Dei largiflua clementia qui eſt Rex Regum; Ego Edgarus Anglorum Baſileus, omniumque rerum, Inſularum Oceani, quæ Britanniam circumja*

To

tent, cunctarumque Nationum quæ infra eam includuntur, Imperator. & Dominus. Ex Chart. fundam. Eccleſ. Wigor. Sir John Boroughs fol. 21. *Idem quoque Edgarus* 400. *Naves congregavit, ex quibus omni anno poſt Feſtum Paſchale* 100. *Naves ad quamlibet Angliæ partem ſtatuit; ſic æſtate Inſulam circumnavigavit; hyeme verò judicia in Provincia exercuit. Ex Ranulph. Ceſtrenſ. fol.* 22. *F. B.*

† So fully proved by Mr. *Selden*, that it would be impertinent in this Tract to rehearſe the authorities he vouches. *Vide Jac Uſſer. Armach. Epiſ. Hiberniæ Sylloge p.* 121, 163.

To mention the ancient *Commiſſions*, and Exerciſe of this Sovereign Power, *Safe-conduct*, *Writs of Seizure*, *Arreſts*, *Records of Grants*, and *Licences* to paſs through the Sea and to fiſh, *Parliament Rolls* and the like, † would make a Volume; in a word, if *Right of Preſcription*, *ſucceſſion of Inheritance*, *continual Claim*, *matter of Fact*, *conſent of Hiſtory* and *Confeſſions*, even from the Mouths and Pens of *adverſaries*, be of any moment to the aſſerting of a Title, his Sacred Majeſty may be preſumed to have as good a Title to that, as the moſt abſolute Monarch this day on Earth, hath to whatever he can claim or does enjoy. 1 *Ro. Ab.* 528. *pl.* 2.

VIII. Now the Duty of the Flag is no more but a conſecutive acknowledgement that the *Right* and *Dominion* of the *Britiſh Seas*, (not as a bare *Honorary Salute* or *Ceremony*, but as an *abſolute Sign* of the Right and *Sovereignty* of thoſe *Seas* where they are obliged to ſtrike Sail) are in him to whoſe *Flag* they veil, and pay that duty to; and in ſubſtance is no more but that the King grants a general Licence for Ships to paſs through his Seas, that are his Friends, paying that obeyſance and duty, like thoſe ſervices when Lords grant out Eſtates, reſerving a *Roſe* or *Pepper Corn*, the value of which is not regarded, but the remembrance and Acknowledgment of their *Benefactor's Right* and *Dominion*.

To be paid by Natives as well as Foreigners.

The Duty of the *Flag* or Salutation, is to be paid not only by Foreigners, but alſo by natural born Subjects, and ſuch who refuſe to pay the ſame, may be brought to the *Flag* to anſwer that Contempt.

Inter Leg. Marinas ſub fine

That this hath been an *Ancient Cuſtom*, always waiting on that Sovereignty, appears by that memorable Record upwards of 400 years ſince made, where it is declared by King *John* what the *Ancient Cuſtom* was, in theſe Words; That if a Lieutenant in any Voyage, being ordained by Common Council of the Kingdom, do encoun-

counter upon the Sea any Ships or Veſſels, laden or unladen, that will not ſtrike and veil their Bonnets at the Commandment of the Lieutenant of the King, but will fight againſt them of the Fleet, that if they can be taken, they be reputed as Enemies, and their Ships, Veſſels, and Goods taken and forfeited as the Goods of Enemies, altho' the Maſters or Poſſeſſors of the ſame would come afterwards, and alledge, that they are the Ships, Veſſels, and Goods of thoſe that are Friends to our Lord the King, and that the common People in the ſame be chaſtiſed by Impriſonment of their Bodies for their Rebellion, by diſcretion.

anni regni Regis Johannis ſecundi. Entitled, Le Ordinance al Haſtings.

Thus this *Immemorial Cuſtom* was by that prudent Prince affirmed, the which hath been always before, and ever ſince (without interruption by all Nations) conſtantly paid to the *Ships of War*, bearing the *Royal Standard*, and other of his Majeſty's *Ships*, wearing his *Colours* and *Enſigns of Service*; he knowing that undoubted *Maxim of State*, *That Kingdoms are preſerved by reputation, which is as well their ſtrongeſt ſupport in Peace, as their chiefeſt ſafety in time of War; when once they grow deſpiſed, they are either ſubject to Foreign Invaſions, or Domeſtick Troubles*, the which (if poſſible) that Prince would have prevented, but he lived when thoſe Celeſtial Bodies, which govern the actions of *Princes*, ſeemed to frown on the moſt Virtuous and Wiſe.

Leon Leſſius de juſtis & jur. l.2.c.2.dub.19.

IX. And as there is no Nation in the World more tender and jealous of their Honour than the *Engliſh*; ſo none more impatienly tolerate the diminution thereof. Hence it was that in all Treaties, before any thing was aſcertained, the *Dominion of the Seas*, and *ſtriking the Top-ſail* was always frſt provided for.

In the Year 1653. after the *Dutch* had meaſured the length of their Swords with thoſe of this Nation, and being ſenſible of the odds, had by their four *Ambaſſadors* moſt humbly beſought Peace, this very Duty of the *Flag* was demanded by the 15th. *Article*, in theſe words:

That the Ships and Veſſels of the ſaid United Provinces, as well Men of War as others, be they in ſingle Ships, or in Fleets, meeting at Sea with any of the Ships of this State of England, or in their ſervice, and wearing the Flag, ſhall ſtrike the Flag, and lower their Top-

Note, That *Cromwel* was the firſt that ever inſerted any ſuch Ar-

ſail, until they paſſed by; and ſhall likewiſe ſubmit themſelves to be viſited if thereto required, and perform all other reſpects due to the ſaid Commonwealth of England, to whom the Dominion and Soveraignty of the Britiſh Seas belong.

ticle into any Treaty: Our Right and Dominion over the *Britiſh* Seas having never been diſputed before, but by an immemorial preſcription and poſſeſſion tranſmitted to us, and ſuppoſed as unqueſtionable by all Princes. *Novem.* 15. 1653.

This was ſo peremptorily demanded, that without the *ſolemn acknowledgment of the Sovereignty over the Britiſh Seas*, there was no Peace to be had; that as to the *acknowledging of the Sovereignty* and the *Flag*, they were willing to continue *the Ancient Cuſtom*, but that of *Viſiting* was ſomewhat hard: 'tis true the latter Clauſe was by the *Uſurper* waved, for Reaſons ſtanding with his private Intereſt; but the firſt was (with the addition of theſe words —— in ſuch mannner as the ſame hath been formerly obſerved in any times whatſoever) made abſolute by the 13th *Article* between *Him* and that *Republick*, in theſe words: *Item quod Naves & Navigia dictarum Fœderatarum Provinciarum, tam bellica & ad Hoſtium vim propulſandam inſtructa, quàm alia, quæ alicui è Navibus bellicis hujus Reipublicæ in maribus Britannicis obviam dederint, vexillum ſuum è mali vertice detrahent, & ſupremum velum demittent, eo modo, quo ullis retrò temporibus, ſub quocunque anteriori regimine unquam obſervatum fuit*, and from thence it was tranſcribed into the 10th *Article* at *Whitehall*, and afterwards into the 19th *Article* at *Breda*, and from thence into the 6th *Article* made laſt at *Weſtminſter* and that Clauſe of ſearching of each others Ships made reciprocate, by the 5th *Article* made in the Marine Treaty at *London*; but that extends not to Ships of War, but only to the Ships of Subjects.

Leo ab Aitzma fol. 847.

Sep. 14. 1662.

Dec. 18. 1674. *S. V.*

X. By the *Britiſh Seas* in the *Article* about the *Flag* are meant the four *Seas*, and not the *Channel* only; for in the 16th *Article* they did expreſs what was meant by the *Britiſh Seas* *

That the Inhabitants and Subjects of the United Provinces may with their Ships and Veſſels furniſhed as Merchant Men, freely uſe their Navigation, ſail, paſs and repaſs in the Seas of Great Britain and Ireland, and the Iſles with-

*But now by the laſt treaty at *Weſtmin.* the dominion is aſcertained from Cape *Fi-*

within the ſame, commonly called the Britiſh Seas, without any wrong or injury to be offered them by the Ships or People of this Commonwealth; but on the contrary ſhall be treated with all love and friendly offices, and may likewiſe with their Men of War——not exceeding ſuch a number as ſhall be agreed upon——ſail, paſs and repaſs through the ſaid Seas, to and from the Countries and Ports beyond them; but in caſe the ſaid States General ſhall have occaſion to paſs through the ſaid Seas with a greater number of Men of War, they ſhall give three Months notice of their intention to the Commonwealth, and obtain their conſent for the paſſing of ſuch a Fleet, for preventing of jealouſie and miſunderſtanding betwixt the States by means thereof.

wiſterre to the middle Point of the Land *Van Staten* in *Norway* Feb. 9. 167½.
Artic. in the Treaty of *Nov.* 15. 1658.

The firſt part of this Article doth plainly ſet out the extent of the *Britiſh Seas*, and that it is not the bare *Chanel* alone that comprehends the ſame, but the four *Seas*: and the ſame is further explained in the Great Caſe of *Conſtable*'s, * where the *Dominion* of the *Queen* (before the Union) as to the Seas, did extend mid-way between *England* and *Spain*, but entirely between *England* and *France*; the *French* never had any right or claim to the *Britiſh Seas*; for in the Wars between *Edward the Firſt* and *Philip the Fair*, (all commerce on both ſides being agreed to be free, ſo that to all Merchants whatſoever there ſhou'd be *induciæ*, which were called *ſufferantiæ Guerræ*, and Judges on both ſides were appointed to take cognizance of all things done againſt theſe *Truces*, and ſhould exerciſe *Judicium ſecundum Legem Mercatoriam & formam ſufferantiæ*) it was contained in the firſt proviſion of that League, that they ſhould defend each others Rights againſt all others; this afterwards occaſioned the introducing that Judgment in the ſame King's time, (before thoſe Judges, choſen by both the ſaid *Princes* by the *Proctors* of the *Prelates*, *Nobility*, and *High Admiral* of *England*, and all the Cities, Towns, and ſubjects of *England*, *&c.* unto which were joined the ſuffrages of the moſt Maritime *Nations*, as *Genoa*, *Catalonia*, *Spain*, *Almain*, *Zealand*, *Holland*, *Friezeland*, *Denmark* and *Norway*, and divers other Subjects of the *Roman Empire*) againſt *Reginer Grimbald*, then *Admiral* of *France*, for that there being Wars between *Philip King of France* and *Guy Earl*

* *Hill* 29 *Eliz.* *B. R.* the Queen and Sir *John Conſtable*'s Caſe *Leonard* 3. *part.* 72.

Selden de Domi Maris l. 2. *c.* 14. 27. 28.

Rolls Abridg. 2 *part.* 174.

Coke 4. *Inſtit.* 142.

of *Flanders*, he had taken Merchants upon thoſe Seas, in their Voyage to *Flanders*, and deſpoiled them of their Goods; whereas the Kings of *England* and their Predeceſſors (as they all jointly do declare and affirm) without all controverſie beyond the memory of Man have had the *Supreme Government of the Engliſh Seas, and the Iſlands thereof.*

1 Ro. Ab. 528. pl. 2. *Præſcribendo ſcilicet Leges, Statuta atq; interdicta armorum, naviumque al. ac Mercatoriis armamentis inſtructarum, cauſationes exigendo, tutelam præbendo, ubicunque opus eſſet, atque alia conſtituendo quæcunque fuerint neceſſaria ad pacem, jus & æquitatem conſervandam inter omnimodas rates tam externas quam in Imperio Anglicano comprehenſas quæ per illud tranſierint; ſupremam iiſdem item fuiſſe atque eſſe tutelam; merum mixtum Imperium in juredicendo ſecundum dictas Leges, Statuta, præſcripta & interdicta, aliiſque in rebus quæ ad ſummum Imperium attinent in locis adjudicatis.*

An univerſal conſent of all Nations.

Which memorable Record apparently ſhews, that the Kings of *England* have had *iſtud regimen & dominium excluſive* of the King of *France* bordering upon the ſame Seas, and of all other Kings and Princes whatſoever; and it was there adjudged that *Grimbald*'s Patent was an uſurpation on the King of *England*'s Dominion, and he adjudged to make ſatisfaction, or if he proved unable, then the King his Maſter ſhould, and that after ſatisfaction he be rendred to puniſhment.

4. Inſtit. 142. Selden cap. 27. Mare clauſum. Sir John Burroughs fol. 42.

And as to the ſecond part of the *Articles* of giving notice, it was but an Act of common Prudence; their late unexpected Viſit, which they then gave, put the *Engliſh* to ſome ſurpriſe; but they facing the *Batavians*, ſoon made them know that they were as capable of beating them *home*, as they were then daring in coming out, and were not to be braved out of a *Dominion* and *Right*, which their Anceſtors had with ſo much Glory acquired and aſſerted.

Anno 1635. XI. By the *Article* of the Offenſive and Defenſive League between *France* and the *United Provinces*, it was agreed, That if at any time the *Dutch Fleet* (——which were to ſcour the *French Coaſts* in the *Mediterranian* from *Pirates*) ſhould at any time meet the *French*, the *Admiral* of the *Dutch* was to *ſtrike his Fl g and lower his Top-ſail* at his firſt approach to the *French Fleet*, and to ſalute the *Ad-*

Ex ab Aitzma Hiſt. Tract. pacis. Belg. pag. 177. Edit. Lugduni Batavor. quarto 1654.

Admiral of *France* with Guns, who was to return the ſaid Salute by Guns alſo, *as was uſual when the Dutch and Engliſh Fleet did meet.*

Only in this the Right of the *Flag* of *England* differs from that claimed by the *French*; for if there had been a failure on the part of the *Dutch*, of paying that reſpect to the *French*, the ſame would have amounted to no more but a breach of the *League*: but the not ſtriking to the King of *England's Flag*, *is open Rebellion*; and the *Article* does ſo ſignifie, for it is there mentioned as *a Right* and *Sovereignty*, not a bare *Dominion* only, like that of *Jeruſalem* to the King of *Spain*. 'Tis very true, the refuſing of it is an abſolute annulling of the Treaty; for though in the League with *England* it is mentioned, yet there is nothing of any conceſſion granted by the ſame, but only recognized there as a Fundamental of the Crown and Dignity of the Kings of *England*; nor was the ſame ever ſo much as mentioned in any former Treaty before O. C's. time, as we have already mentioned, but it was always a Clauſe in the Inſtructions of the *Admiral* and the Commanders under him, That in caſe they met with any Ships whatſoever on the *Britiſh* Seas that refuſed to ſtrike Sail at the Command of the King's *Admiral* or his Lieutenants, that then they ſhould repute them as Enemies (without expecting any declared War) and deſtroy them and their Ships, or otherwiſe ſeize and confiſcate their Ships and Goods; and theſe Inſtructions amongſt others continue to this day. The like are given by the *Venetians* to their Captains in reference to the *Adriatick* Sea, and by ſeveral other Princes.

XII. The Duty of the *Flag* that hath been ſo conſtantly paid to our *Anceſtors* is of ſuch advantage to the continuing the Renown of this Nation, that it ſerveth to imprint *new Reverence* in *Foreigners* that render it, and adds new Courage to thoſe of our *Seamen* that exact it: and ſince we know how much it imports a State that it be *reverenced abroad*, and that *Repute* is the principal Support of any *Government*, it equally influenceth the Subjects at *Home* and *Foreign Allies* Abroad. And as there is no Nation in the World more tender of their Honour than the *Engliſh*, ſo none more impatiently tolerate the diminution thereof. With what reſentments would not only the

more *Generous* and *Noble*, but even the *Popular* and *vulgar Seamen* deteſt this or any ſucceeding Age, ſhould they remit or loſe that *Regality*, thoſe Acknowledgments which their Predeceſſors with ſo much Glory aſſerted, and the Neglect whereof was always puniſhed as open *Rebellion?* the indignity of ſuch an Action being ſufficient to enflame the whole Kingdom. The conſideration of which, beſides his Sacred Majeſty's own Royal Inclination to the ſame, and his evident teſtimonies never to abandon a Ceremony of ſo high a concernment; witneſs the expoſing the one half of his own heart his *Royal Highneſs*, in the aſſerting the ſame, with ſuch *Fleets* and in ſuch *Battels*, that no Age or time can ſhew a Memorial of the like; are cauſes ſufficient to create in us new flames of Love to thoſe *Royal Patriots* and Defenders of our *Rights*. *Private Perſons* move in another Sphere, and act by other Rules than *Soveraign Powers*; the regard of Credit with them may oftentimes yield to thoſe of Utility or other motives; the *Publick* receives little injury thereby, nor is their Wiſdom queſtioned for ſuch *punctilio*'s, if they relinquiſh them for other Emoluments or peace ſake; but Soveraigns cannot ſo tranſact, their Subjects the People participate in their Honour and Indignities; they have a Property, a direct *Right* in the former *: *Sovereigns* cannot alienate or ſuffer their Honours to be impaired, becauſe it is not *really theirs*, it appertains *to the Nation* univerſally, and they are all effectually injured by ſuch Tranſactions, either becauſe the indignity really extends *to them*, or becauſe the *Government* and *Authority* is thereupon *weakned* and prejudiced, which is the greateſt of *Civil detriments* that can befal a People, though *ordinarily* they are not aware thereof.

It is no policy to attempt the change of old Cuſtoms and Uſages, even errors and abuſes are upon ſuch an account legally tolerated. *In omnibus rebus vetuſtas ipſa plurimum habet dignitatis: ita ut Maſſalienſes quorum præſtantiſſima creditur fuiſſe Reſpublica, laudentur eo nomine quod gladio ad puniendos ſontes uſi ſint eodem à condita Urbe, quo indicarent in minimis quoque rebus antiquæ conſuetudinis momenta ſervanda. Proxime enim ad Deum accedit Antiquitas, æternitatis quadam imagine. Grot. de Antiq. Reipub. Batav. in Præfat.* * *Vide* The Earl of *Shaftsbury*'s Speech to the Parliament 1672. *Cæteris mortalibus in eo ſtare conſilia, quid ſibi conducere putent: Principum diverſam eſſe ſortem, quibus præcipua rerum ad ſummam dirigenda. Tacit. Annal. lib. 4. Si fama tua videtur neceſſaria, rectam muneris tui adminiſtrationem non poteſt condonare. Leſſius de Inſt. l. 2. c. 11. dub. 24. §. 26.*

As Prudence doth thus diſtinguiſh betwixt the Demeanor of *Private* and *Publick* Perſons, ſo doth *Charity* it ſelf; for

for though the *Goſpel* precepts do oblige particular Perſons to bear Injuries and Contumelies with patience, and to ſurrender even the *Coat* as well as the *Cloak*; yet is not this ſo to be conſtrued, as if even private *Chriſtians* were to yield up their *Civil Rights* to every inſolent one that would incroach upon, and uſurp them, or that they were to *deprive* themſelves of thoſe *Reparations*, which the *Law* and *Government* affords them; neither is it ſo to be underſtood as if the *Civil Magiſtrate* in *Chriſtendom* might not ſecure himſelf of that Obedience and Reverence, which is due unto Dignity, but *bear the Sword in vain.*

XIII. This being the *value* which this Nation did always place upon the *Right of the Flag*, the which they never did regard only as a Civility and Reſpect, but as a principal Teſtimony of the unqueſtionable Right of this Nation to the Dominion and Superiority of the adjacent Seas, acknowledged generally by all the Neighbour *States* and *Princes of Europe*, and muſt be paid and acknowledged by all *Princes* in the *World*, that ſhall be or paſs on the ſame.

The Effects of this *Dominion Univerſal* or *Sovereignty* which accrue to a *Prince* are theſe:

1. Not only the Regality of the fiſhing for Pearl, Coral, Amber, *&c.* but likewiſe the Advantage of all Fiſh Royal, as Whales, Sturgeon, *&c.* and not only thoſe, but alſo the direction and diſpoſal of all other Fiſh according as they ſhall ſeem to deſerve the regards of the Publick, as in *Spain*, *Portugal*, &c. is uſed.

Jean Palatius de Dom. Maris lib. 1. *c.* 11. Sir *Henry Conſtable*'s Caſe *Coke* 5. *part. fol.* 107.

2. The preſcribing of Laws and Rules for Navigation, not only to his own Subjects, but unto other Strangers, whether they be Princes of equal ſtrength and dignity with himſelf or any way inferior. Thus the *Romans* did confine the *Carthaginians* to equip out no Fleets, and forbade *Antiochus* to build any more than twelve Ships of War: and if Tradition informs me right, Queen *Elizabeth* interdicted the then *French* King to build any other or more Ships of War than what they then had, without her leave firſt obtained. The *Athenians* prohibited all *Median* Ships of War to come within their Seas, and preſcrib'd to the *Lacedæmonians* with what manner of Veſſels they ſhould ſail. All Hiſtories are full of ſuch Precedents which Princes have Enacted either upon Agreements enforced upon the Conquered, or Capitulations betwixt

Grotius de Jure Belli. l. 2. *c.* 3. §. 15.

them and others their equals or inferiors for mutual conveniences.

Joan Palatius ubi ſupra. Julius Paucius de Dom. Maris Adriatici.

3. The Power of impoſing Cuſtoms, Gabels, and Taxes upon thoſe that navigate in their Seas, or otherwiſe fiſh therein, which they do upon ſeveral rightful Claims, as protecting them from Pirates, and all other Acts of Hoſtilities, or aſſiſting them with Lights and Sea marks, for which advantages common Equity obligeth thoſe that reap benefit thereby, to repay it with ſome acknowledgment, which ought to be proportioned according to the favour received, and the Expence which the Prince is at to continue it unto them.

13 *H.* 3. *fol.* 14. *Coke* 5. *part. fol.* 63. Caſe Chamberlain of *London.*

4. As it is incumbent on a Prince duly to execute Juſtice in his Kingdoms by Land, ſo the Sea being his Territory, it is requiſite and a neceſſary effect of his Dominion, that he cauſe Juſtice to be adminiſtred in caſe of Maritime Delinquences.

5. That in caſe any Ships navigate in thoſe Seas, they ſhall ſalute his floating Caſtles, the Ships of War, by *lowering the Top-ſail, ſtriking the Flag* (thoſe are the moſt uſual courſes) in like manner as they do his Forts upon Land; by which ſort of Submiſſions they are put in remembrance, that they are come into a Territory wherein they are to own a Sovereign Power and Juriſdiction, and receive Protecton from it.

Theſe are the proper Effects of a real and abſolute Sovereignty over the Seas, which how they are poſſeſſed by the *Venetians*, this enſuing Account will declare.

The Gulph of *Venice* is nothing elſe but a large Bay or Inlet of the Sea, which entring in betwixt two Lands, and ſevering them for many Miles continuance, in the end receives a ſtop or interruption of further paſſage by an oppoſite Shore, which joins both the oppoſite Shores together: It is called the Gulph of *Venice*, from the City of *Venice*, ſituate upon certain broken Iſlands near unto the bottom thereof: it is alſo called the *Adriatick* Sea, from the Ancient City *Adria*, not lying far diſtant from the former; from the Entrance thereof unto the Bottom it contains about ſix hundred *Italian* Miles, where it is broadeſt it is an hundred and ſixty Miles over, in others but eighty, and in moſt an hundred. The South-Weſt ſhore is bounded with the Provinces of *Puglia* and *Abruzzo*

zo in the Kingdom of *Naples*; the Marquiſate of *Ancona* and *Romagnia* in the Pope's State; and the Marquiſate of *Treviſana* in the *Venetian* State: The North part of it, or Bottom, hath *Friuli* for its bounds; the North-Eaſt is limited by *Iſtria*, *Dalmatia*, *Albania*, and *Epirus*: whereof *Iſtria* doth not ſo entirely belong to the *Venetians*, but that the Emperor as Arch-Duke of *Gratz*, doth poſſeſs divers Maritime Towns therein; in *Dalmatia*, ſaving *Zara*, *Spalato*, and *Cataro*, they have nothing of importance, the reſt belonging to *Raguſa* and the *Turks*: in *Albania* and *Epirus* they poſſeſs nothing at all, it being entirely the *Turks*; ſo that he who ſhall examine the circuit of the Sea, which muſt contain about twelve hundred Miles, ſhall find the Shores of the *Venetian* Signory not to take up two hundred of them, omitting ſome ſcattered Towns and diſperſed Iſlands lying on the *Turkiſh* ſide of the *Adriatick* Shore.

'Tis very true of late by the great Conduct and good Fortune of the Generals *Moroſini* and *Coningſmarke*, they have now got *Alba Regalis* and almoſt the principal parts of the *Morea*.

For the ſecuring hereof from the depredations of Pirates, and the Pretences of divers potent Princes, as the Pope, Emperor, King of *Spain*, and the Great *Turk*, who each of them have large Territories lying thereupon; alſo to cauſe all Ships which Navigate the ſame to go to *Venice*, and there to pay Cuſtom and other Duties, the Republick maintains continually in action a great number of Ships, Gallies, and Galliots; whereto alſo they add more, as there may be occaſion, whereof ſome lie about the bottom of the Gulph in *Iſtria*, others about the Iſlands of *Dalmatia* to clear thoſe parts of Pirates, who have much infeſted thoſe Seas and others; and thoſe of moſt force have their ſtation in the Iſland of *Corfu* and *Standia*; in the firſt of which commonly reſides the Captain of the *Gulph*, whoſe Office is to ſecure the Navigation of the *Gulph*, not only from the *Corſairs*, but to provide, that neither the Gallies or Ships of the Pope or King of *Spain*, nor Great *Turk* do ſo much as enter the ſame, without permiſſion of the Signiory, and upon ſuch conditions as beſt pleaſe them, which they are ſo careful to effect, that in the Year 1638 the *Turkiſh* Fleet entring the *Gulph* without Licence, was aſſailed by the *Venetian* General, who ſunk divers of their Veſſels, and compelling the reſt to fly into *Valona*, he held them there beſieged, although the ſame City and Port whereon it ſtands, be under the Juriſdiction of the *Grand Signior*, and notwithſtanding that

Baptiſta Nani his Hiſtory of *Venice*, *lib.* 11. *fol.* 446, 447, 448.

that a great and dangerous War was likely to enſue thereupon betwixt the *Grand Signior* and the *Republick*, becauſe the *Venetian* General being not content to have chaſed them into their own Ports, did moreover than that ſink their Veſſels, and landing his Men, ſlew divers of their Mariners, who had eſcaped his fury at Sea; yet after that a very honourable Peace was concluded again betwixt them, wherein amongſt other things it was agreed, That it ſhould be lawful for the *Venetians*, as often as any *Turkiſh* Veſſels did *without their licence enter the Gulph*, to ſeize upon them by force, if they would not otherwiſe obey, and that it ſhould likewiſe be lawful for them ſo to do within any Haven, or under any Fort of the *Grand Signior's* bordering on any part of the *Venetian Gulph*: So jealous hath this *Republick* been in all times to permit any to ſail the *Gulph*, that in the Year 1630. (as *Palatius* relates) that *Mary*, Siſter to the King of *Spain*, being eſpouſed to the Emperor's Son *Ferdinand* King of *Hungary*, the *Spaniards* deſigned to tranſport her from *Naples* in a Fleet of their own, the *Venetians* ſuſpected that they had an intention hereby to intrench upon, and privily to undermine, by this ſpecious Precedent, that Dominion of the Sea which the Signiory had continued inviolate *time out of mind*; and that they took this Opportunity when *Venice* was involved with a War abroad, and infeſted with the Plague at home, and therefore not in a condition to oppoſe their Progreſs. The *Spaniſh* Ambaſſador acquainted the State, that his Maſter's Fleet was to convey the Queen of *Hungary*, being his Siſter, from *Naples* to *Trieſti*: The Duke replied, That her Majeſty ſhould not paſs but in the Gallies of the Republick; the *Spaniard* replied thereat, pretending that they were infected with the Plague: The Senate being conſulted, came to this Reſolution, That the Siſter of his Catholick Majeſty ſhould not be tranſported to *Trieſti* any other way, than by embarking in the *Venetian* Gallies, according to the uſual manner of the Gulph; and that if the Ambaſſador would acquieſce therein, her Majeſty ſhould be attended and uſed with all that reſpect and deference which became her Quality: *but if ſhe proceeded any other way, the Republick would by force aſſert her proper Rights, and attack the* Spaniſh *Navy as if they were Enemies, and in Hoſtile manner invade them.*

De Domin. Maris. l. 2. *c.* 6.

Where-

Whereupon the *Spaniard* was compelled to deſire the favour of them to tranſport the Queen in their Gallies, which *Antonio Piſano* did perform with much State and Ceremony; and the Courteſie was acknowledged by the Courts of the Emperor and King of *Spain*.

XIV. The *Maritime Dominion* by the *Laws* of *England* were always accounted the *Four Seas*; ſuch as are born thereon are not *Aliens*, and to be within them is to be within the *Legeance* of the *King* and *Realm* of *England*. *Selden Mare Clauſ. l. 2. c. 24. Fitzherb. protection, tit. 46. Seld. ibid. c. 23. Coke 4. Inſtit. fol. 142.*

The Records in the days of *Edward the Third* and *Henry the Fifth* proclaim it, that thoſe Kings and their *Progenitors* had ever been *Lords of the Sea*; and amongſt thoſe many great Inſtances of proving the *Sovereignty* of the ſame, is that famous Record of *Edward the Firſt* and *Philip the Fair* of *France*, in which were the *Procurators* of moſt Nations bordering upon the Sea throughout *Europe*, as the *Genoeſes*, *Catalonians*, *Almaines*, *Zelanders*, *Hollanders*, *Frieze-landers*, *Danes*, and *Norwygians*, beſides others under the Dominion of the *Roman German Empire*, where all jointly declare, That the Kings of England, by right of the ſaid Kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable poſſeſſion of the Sovereign Lordſhip of the Seas of England, and of the Iſles within the ſame, with power of making and eſtabliſhing Laws, Statutes, and Prohibitions of Arms, and of Ships otherwiſe furniſhed than Merchant Men uſe to be, and of taking ſurety, and affording ſafe-guard in all caſes where need ſhall require, and of ordering all things neceſſary for the maintaining of Peace, Right and Equity among all manner of People, as well of other Dominions, as their own paſſing through the ſaid Seas, and the Sovereign Guard thereof. *1 Ro. Ab. 528. pl. 2.* *Vide* part of the Record.

By which it plainly appears, That the Kings of *England* had then been in peaceable poſſeſſion of the ſaid *Dominion* by immemorial Preſcription, that the Sovereignty belongeth unto them, not becauſe they were *Domini utriuſque ripæ*, when they had both *England* and *Normandy*, and were Lords of both Shores; (for *Edward the Firſt* at that time had not *Normandy*) but that it is inſeparably appendant and annexed to the Kingdom of *England*, our Kings being *Superiour Lords of the ſaid Seas*, by reaſon (as the very Record mentions) of the ſaid King- And the Caſe *27 Eliz. in B. R.* Sir *John Conſtable's*, *Leonard 3 part.* 72.

The reaſon of the opinion there is miſtaken; for the right unto the Sea ariſeth not from the poſſeſſion of the ſhores; for the Sea and Land make diſtinct Territories, and by the laws of England the Land is called the Realm, but the Sea the Dominion; and as the loſs of one Province doth not infer that the Prince muſt reſign up the reſt; ſo the loſs of the Land Territory doth not by Concomitancy argue the loſs of the adjacent Seas. It is no more neceſſary that every Sea-Town ſhould command an hundred Miles at Sea, than that each City ſhould command an hundred Miles by Land. Julius Paucius de Domin. Maris Adriatici.

Kingdom: and ſince that the Sovereignty of the Sea did always appertain unto the *Engliſh King*, not in any *other Right than that of the Kingdom of England*; no Prince or Republick ought or can doubt the Title by which our preſent Claim is deduced; 'tis in right of *Britannia*, that the ſame is challenged, 'twas in that right the *Romans* held it: the claim juſtified *Edward the Third* and his *Roſe Noble*, though there are other reaſons regarding the *Lancaſtrian* Line, which yield a Colour for the uſe of *Port-cullis* in the *Royal Banners* of *England*; yet as in reference to the *Maritime Dominion*, *Henry* the *Eighth* did embelliſh his *Navy Royal* therewith, and *Queen Elizabeth* ſtamped it upon thoſe *Dollars* which ſhe deſigned for the *Eaſt India* Trade, ſignifying her power of ſhutting up the Seas, if ſhe thought fit (as by a *Port-cullis*) with the *Navy Royal*; this *Dominion* of the *Britiſh Seas* did Authenticate the Proclamation of King *James*, ordaing the *Flemiſh* at *London* and *Edinborough* to take licence to fiſh: this juſtified the like Proclamation by the late *Royal Martyr King Charles*, and warranted by the *Earl of Northumberland* in his Naval Expedition.

Anno Domini 1600.

Anno Domini 1609.

Anno Domini 1636.

That *Preſcription* is valid againſt the *Claims* of Soveraign Princes cannot be denied, by any who regard the *Holy Scripture*, *Reaſon*, the *practice* and *tranquillity* of the World: and that true it is, the modern *Dutch* have pretended, if not dared, to challenge the Freedom to Fiſh in the *Britiſh Seas*, by *Preſcription*; but it is likewiſe as true that *Preſcription* depends not upon the *Corporeal* but the *Civil* poſſeſſion, and that is retained, if *claim* be but made ſo often as to *barr the Preſcription*, the which hath been always made evident; firſt by frequent *Medals*, next by puniſhing thoſe that refuſed it as Rebels, by guarding of it; and laſtly by giving Laws time out of Mind on it which evidently proves that the Civil poſſeſſion is not re-

Will. Falbeck's Pandects of the Law of Nations *cap.* 4. The King againſt Sir *John Byron. Bridgman fol.* 23, 24, 25.

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[rel]inquiſhed; and our Kings conſtantly claiming the Domi-[n]ion of the ſame, none elſe pretending, all Nations ac-[k]nowledging it to be in them, and the ſame never queſti-[o]ned, till thoſe modern *Dutch* (of yeſterday) aroſe.

XV. The Importance of the Dominion of the Sea unto this Nation, is very great, for on that alone depends our Security, our Wealth, our Glory; from hence it is that *England* hath a Right to all thoſe Advantages and Emoluments, which the *Venetian* Republick draws from the *Adriatick Sea*, where the Ships of the *Grand Signior*, of the *Emperor*, King of *Spain*, and *Pope* pay Cuſtoms, to maintain thoſe *Fleets*, which give Laws to them within the *Gulph*; 'tis hereby that the *Engliſh* can ſhut up or open theſe Seas for Ships or Fleets to paſs or repaſs them; whereto Queen *Elizabeth* had ſo ſpecial a regard, that when the King of *Denmark* and the *Hanſiatick* Towns ſolicited her Majeſty to permit them free paſſage, they tranſporting Corn into *Spain*, ſhe refuſed them; and when a *Proteſtant Fleet of Hamburgers* and others, had preſumed to do ſo, notwithſtanding her Prohibition, ſhe cauſed her *Navy Royal* to ſeize, take, burn, and ſpoil them, when they were paſſed her Maritime Territory, within ſight of *Lisbon*; yielding this reaſon for her juſtification, That they not only relieved her Enemy with Proviſions, but had preſumptuouſly made uſe of her Seas, without obtaining her Royal Permiſſion for ſo doing: 'tis from hence that the Crown of *England* can juſtly demand an account of any Ship or Ships occurring in thoſe Seas, what's their Buſineſs, and what their Intentions are; and prohibit any Prince or Republick to enter there with potent Fleets, without preacquainting his Majeſty, and obtaining his Royal Permiſſion; without which Dominion and Sovereignty *England* can never live ſecure on ſhore, it being eaſie for any Foreign Fleets to amuſe us with ſpecious pretences, and in their paſſage to invade and ſurpriſe us. Thus while the *Turk* pretended to ſail for *Malta*, he occaſionally poſſeſſed himſelf of *Canea*, in the Iſle of *Candia*, and after having taſted the ſweet of that place, never forſook it, till he made himſelf Maſter of the whole. Many ſuch Precedents do occur in Hiſtory: And in fear of ſuch Suprizal, the *Athenians* (being Lords at Sea) did exclude the *Perſian* Monarchs from ſend-

Vide poſtea in Cap. of Cuſtoms.

June 30. *Anno* 1598.

Selden lib. 1. *cap.* 11.

ſending any Ships of War into any part of the *Ægean* Sea, *Rhodian*, *Carpathian*, and *Lydian* Seas, and that which tends to the *Weſt*, towards *Athens*; the like Caution was uſed by the *Romans* againſt *Antiochus* and the *Carthaginians*; and the *Turk* prohibits all Nations, ſaving his Vaſſals, to enter the *Black Sea* or *Pontus Euxinus*, and alſo the *Red Sea*; and that 'tis by virtue and force of this Right that the *Britiſh Nation* can drive on their own Commerce, navigate themſelves, and permit others ſecurely to trade with them. 'Tis true that the *Dutch* have preſumed ſome years ſince, to *violate* the ſecurity of the *Britiſh Seas*, by the attacking the Allies of *England*, not only within the *Britiſh Seas*, but in her *Harbours*, attempting to purſue a *French* Veſſel up almoſt to *London*, and have more than once * attacked the *Spaniſh* Fleets in her Roads, under the protection of her Caſtles, and that againſt the *Laws of Nations*, and the *Peace of Ports*, in which for the time they ſeemed to cloud the *Honour* of the *Nation*, but ſatisfaction for Indignities of that nature, though *ſlow*, yet are *ſure*, and ſhould ſuch as thoſe have been longer tolerated beloved *Britannia* muſt become a proſtitute, by a Confederation of thoſe *States*, or take *Paſs-ports* for her Commerce; but the *Royal Martyr's* Goodneſs was no longer to be trod on, his Heart and his Cauſe were good, and though thoſe unhappy Times (which were crooked to whatſoever ſeemed ſtraight) did hinder the accompliſhments of his entire intention for *Satisfaction*; yet thoſe whom the juſt *God of Heaven* was pleaſed for a time to permit as a puniſhment to this Nation to rule, did not want in the *fulfilling*; for ſo ſoon as he was pleaſed to ſtay the fury of the *Inteſtine Sword*, their Hearts took *fire* from thoſe *flames* that had formerly been kindled in that *Royal Breaſt*, and having prepared a Fleet, in order to the treating as Soldiers with Swords in their hands, they were in the like manner aſſaulted in their Territories in the *Downs* (but the *Dutch* found then what it was (though two for one) to aſſault a *Britiſh Lyon* at the mouth of his *Den*) intending, if poſſible, to have deſtroyed the *Engliſh Power*, but were fruſtrated in their deſign, being ſeverely beaten home to their own doors; and afterwards thoſe that then had got the *Engliſh* Sword in their hands, begun to conſider that the *Victory* muſt be

Albert Gentil. Hiſp. Advocat. l. 1. c. 14. Vide Mr. Secretary Cook's Letter to Sir *Will. Boſwel April* 26. 1635.

* The fight of the *Dutch* with the *Spaniſh* Fleet in the *Downes*, 1639. *Scilicet hoc factum Hollanderum eſt contra juſtitiam omnem pro certo, & contra reverentiam quæ partibus & territoriis debetur alienis. Alb. Gent. Hiſpan. Advocat. lib. 1. cap.* 14.

Anno Domini 1552.

be purſued as a ſeaſon fit to aſſert their *Ancient Right* and *Soveraignty* of the Sea, and then thoſe People thinking that the odds before was not enough to deſtroy the *Britiſh Fleet*, they equipt out a Fleet Greater and far more numerous than the *Engliſh*, under the *Admirals*, *Van Trump*, *De Wit*, the two *Evertſons* and *Ruyter*; but they ſuffered the ſame Fate as their former, about ſome thirty four of their *Ships* on the Coaſt of *Flanders*, burnt and taken, and the reſt chaſed home to their Ports; and not long after followed the total defeat of their *Naval Forces*, accompanied with the death of *Van Trump* by the *Engliſh*, under the *Admirals*, *Blake* and *Monk*, who had ſunk and fired about thirty more of their *Ships of War* (no quarter being given till the end of the Battel) ſix *Captains* and about a thouſand *Men* were taken Priſoners, and about ſix thouſand ſlain. Of their *Preſumptions* ſince (amongſt other things) in denying the Duty of the *Flag*, and what puniſhment and chek they have had for the ſame, to what condition they have been reduced, and made to acknowledge *that Dominion and Superiority* to that Crown (under which their *Anceſtors* humbly * beſought the acceptance of the *Sovereignty* of the *Netherlands*, might be annexed and protected) is now freſh in our memories; ſo high and of ſo great Importance is this *Dominion* and *Sovereignty* ſignified by the *Duty of the Flag in the Britiſh circumjacent Seas*.

June 2, and 3.

About the 8 of *Aug.* 1653.

* Offered to Queen *Eliz.* *Cette cy entre autres merite bien une conſideration ſpeciale, Que la conjunction deſdits Pays de Hollande, Zelande, Frize, & des Villes de l'Eſcluz, & Oſtende en Flanders, avec les Royaumes de voſtre* Majeſté, *emporte & ſoit l' Empire de la Grande Mer Oceane; & par conſequent une aſſurance &* Felicité *perpetuelle pour les Subjects de voſtre* Sereniſſime Majeſté. John Stow's Supplement to Hollingſhed, *An Dom.* 1585. *Vide* Sir Walter Raleigh, *lib.* 5. *cap.* 2. §. 2, & 3.

CHAP.

Chap. VI.

Of the Right of Preſſing or Seizing of Ships or Mariners for Service Publick.

I. *That ſuch Right is excepted in the Law of Dominion.*
II. *Whether the Ships of Nations who are in War at the ſame time, may be preſſed, the danger being equal.*
III. *Whether this Right extends to Ships to fight, and no more, or gives a power to trade.*
IV. *By the Laws of* England *the King may ſeize.*
V. *The reaſon why ſuch a power was veſted in the Admiral.*
VI. *That ſuch a Right of compelling Men to ſerve in Naval Expeditions may be.*
VII. *Objections legal refuted.*
VIII. *Of the ancient puniſhment o[f] ſuch deſerters of the King's ſervice.*
IX. *Concerning the ſeveral Statute[s] this day in force touching Mariners and Soldiers.*
X. *Whether it be lawful for a private Man to execute Juſtice o[n] ſuch as fly and deſert the ſervice.*
XI. *Where a general Commiſſion i[s] given to Men to execute Juſtice.*
XII. *Several Caſes touching the Admiralty and their Juriſdiction[,] Ships or Boats found at Sea, Royal Fiſh and Deodands belong to th[e] Admiralty.*

I. THE *Civil Law*, though it can command nothing which the *Law of Nature* forbids, nor forbid wha[t] it commands; nevertheleſs it may circumſcribe natura[l] Liberty, and prohibit what was naturally lawful: an[d] alſo by its force *antevert* that very Dominion, which i[s] naturally to be acquired. Hence it is that Princes, b[y] the Law of Nations, may acquire a Right of uſe, of thing[s] that do belong to private Perſons; for property hath no[t] (as hath been ſaid) ſwallowed up all that *Right*, whic[h] roſe from the common ſtate of things; becauſe as all Law[s] are to to be conſtrued as near as poſſible to the intention o[f] the Makers, ſo we muſt conſider what was the mind o[f] those that firſt introduced ſingular Dominions: now th[e] Rule to conſtrue that, muſt be as near as poſſible to na[-] tural equity, and that in extreme neceſſity that old righ[t] of uſing things ſhould revive as if the things had remaine[d] common, the ſame ſtanding with the Intereſt of all hu[-] mane Conſtitutions; and therefore in the Law of Dom[i-] nio[n]

Enra, *aut mal aut neceſſario facinore retenta. Liv. lib.* 24.

nion extreme Neceſſity ſeems excepted. Hence it is that the Veſſels and Ships of what nature and Nation ſoever † that ſhall be found riding in the Ports or Havens of any Prince or State, may be ſiezed on, and imployed upon any ſervice of that Sovereign that ſhall ſeize the ſame, being but a harmleſs utility, not diveſting the Owners of their intereſt or Property.

† *F. de Navibus non excuſ.* C. *l.* 11. *tit.* 3. and *Pekius* on the ſame Law.

II. If a Ship of the King of *Denmark* be in the Port of *London*, and the *Swede* is in War with that Prince; and it happens at that time the King of *Britain* is in War with the *Spaniard*; now the Poſſeſſor is here preſſed with an equal neceſſity, and by the ſame argument is rather obliged to the defence of his own Country than another, whether by the Law of Nations the Ship ought to be detained, hath been doubted; moſt certain they may: who would not pluck a ſhipwrackt Man from his plank, or a wounded man from his Horſe, rather than ſuffer himſelf to periſh? to ſlight which is a ſin, and to preſerve, the higheſt of wiſdom: beſides, in the taking of the Veſſel the right is not taken from the Owner, but only the uſe, which when the neceſſity is over, there is a condition of reſtoring annexed tacitly to ſuch a ſeizure.

Quidni enim (*inquit Cicero*) *quando ſine detrimento ſuo poteſt, alteri communicet, in iis quæ ſunt accipienti utilia danti non moleſta?* 1. *de Offic.* 1.

And doubtleſs the ſame Right remains to ſeize the *Ships of War* of any Nations, as well as thoſe of private intereſt, the which may be imployed as occaſion ſhall preſent: So the *Grecians* ſeiz'd † on Ships of all Nations that were in Ports, by the advice of *Xenophon*; but in the time provided food and wages to the Mariners.

† *De Expeditione Cyri.*

III. Whether this Right extends ſo far as to give Princes a power to ſeize in order to traffick may be ſome queſtion; certainly if the Traffick be for ſuch Commodities, as Maſts, Timber, Tar, Powder, Shot, or other Commodities or Accoutrements of Arms, or Naval Proviſions of offence neceſſary for the defence of the Realm, it may be done (but then it is juſt, *freight* * ſhould be paid) for what hurt can it do me to let another have my Boat to paſs over the Ford, if he rewards me? and if that be anſwered, the Owners are at no prejudice, for this is but a harmleſs utility.

10 *Ed.* 3. *m.* 16. 12.

* 23 *Ed.* 1. *Rott.* 77. in the Exchequer.

IV. By the Laws of *England* there is no queſtion, but the King may ſeize, and it appears by very many ancient Records, that he might do it, and it was one of the Arti-

12 *E.* 3. in the Black-Book of the Admiralty.

cles

P. 26. and 27. 6 Joh. m. 11. 2 Joh. m. 3. 24 Ed. 2. m. 17. 11 R. 2. m. 13. Rot. Franc.

cles of Enquiry amongſt others. Item, ſoit enquis de Neſs, que ſont arreſtees pour le ſervice du Roy, ou pour autre raiſonable cauſe per les Officers du Roy, ou de l'Admiral, & debriſent l'Arreſt, & par les quelles avantdictes Neſs ſont emmenez, & retamer les Mariners qui ſont ordonnez pour le ſervice du Roy; & ſi retracent, & en cas que homme ſoit endite qui la debruſe l'Arreſt en ſa Neſ arreſtee pour le ſervice du Roy, & de ce ſoit convicte par xi. il perdra ſa Neſ ſi'l na grace du Roy ou du hault Admiral, & pour ce quil a eſte pluſieurs fois debatu en Angleterre pour les arreſtes des Neſs. quant le Roy amande Sergeants d'Arms, ou autre Miniſtres pour arreſter Neſs al oeps du Roy, & les Seigneurs des Neſs ſont venus devant l'Admiral, & alleguent que leurs Neſs neſtoient mye arreſtees, ordonne eſtoit au temps du Roy Richard le Primier a Grimsby per advis de pluſieurs Seigneurs du Royalme, que quant Neſs ſeront arreſtees pour ſervice du Roy, que le Roy eſcripta par ſes Lettres Patentes a l'Admiral d'arreſter leſs Neſs plus ou moins a la voulonte du Roy, & ſelon ce quil a beſoin, & l'Admiral eſcripra au Roy ou au Chancelier d'Angleterre les noms des Neſs ainſi arreſtees aſſemblement avec les noms des Seigneurs & Maiſtres d'icelles, & en tel cas le Seigneur de la Neſ ne le Maiſtre ne viendront pas a dire que la Neſ neſtoit mye arreſtee ne a ce ne ſeront oyz, and that upon ſuch Arreſts broken, the Parties might be puniſhed and fined.

De Offic. Admiral. Angliæ per Roughton, Artic. 10.

Again, *Inquiratur ſi arreſtatus, ad ſerviendum Regi fregit arreſtum, hujuſmodi tranſgreſſor ſtat in gratia Regia ſive Admiralli ſui utrum voluerint committere Carceribus mancipandum vel finem facere, in hac parte ſi arreſtum hujuſmodi factum manifeſtum fuerit cognitum.*

The Black-Book of the Amiralty, *fol.* 28, 29. & 157, 158. 15 *R.* 2. *c.* 3.

If the *Admiral* by the King's Command arreſts any Ships for the King's Service, and he or his Lieutenant return and certifie the Arreſt or a Liſt of the Ships arreſted into *Chancery*, no Maſter or Owner of the Ships ſo arreſted ſhall be received to plead againſt the Return, pur ceo que l'Admiral & ſon Lieutenant ſont de record.

Item, *Inquirendum de omnibus Navibus quæ ad ſerviendum Domino Regi ſuper mari arreſtatæ fuerint, & poſtea Domini poſſeſſores, ſive Magiſtri dolo & fraude à ſervitio hujuſmodi ſe ſubtraxerunt in deceptionem Domini Regis, qui*

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ſi inde poſtea indictati fuerint, & convicti ſuper hoc, naves ſuæ Domino Regi foriſfactæ per ordinationem Domini Regis Richardi Primi; *& ſi Domini, Poſſeſſores, vel Magiſtri hujuſmodi inde coram Domino Rege & Cancellario ſuo per aliquas allegationes ſe aut naves hujuſmodi excuſare voluerint, ſi Admirallus vel locum tenentes ſui per Literas ſuas Patentes de arreſto hujuſmodi facto fidem fecerint pleniorem, Domini, Poſſeſſores, aut Magiſtri prædicti nullo modo audiri debeant, ſeu eis fides quovis modo adhiberi, eo quod Admirallus & locum tenentes ſui ſunt de recordo.*

And if the Ship ſo arreſted break the Arreſt, and the Maſter or Owner thereof be indicted and convicted devant l'Admiral by the Oath of twelve men, the Ship ſhall be confiſcate to the King, which power the *General* maintains in all places where he has power, and the ſame ſeems to be provided for in the latter *Clauſe of* 15 *R.* 2 *Ca.* 3. *Cro. Arg.* of *Hampden*'s C, called the Ship mony C. *fol.* 79, to 100.

VI. By King Ethelred, his *Biſhops* and *Nobles* in the General *Council* of Enham, *Anno* 1009. for the ſetting out a Fleet every Year, and the puniſhment of thoſe who hurt or ſpoiled any Ship, or deſerted the Service, eſpecially if the King was preſent in the Expedition, amongſt others it was Enacted, *Si quis Navem in Reipub. Expeditionem deſignatam vitiaverit, damnum integre reſtituito & Pacem Regis violatam compenſato; ſi verò ita prorſus corruperit, ut deinceps nihili habeatur, plenam luito injuriam & læſam præterea Majeſtatem.* So Sir *Henry Spelman*'s Verſion out of the *Saxon* Copy renders it, but the ancient Copy hath it more largely. *Spelmanni Concil. Tom. fol.* 520, 521.

Naves per ſingulos annos ob patriæ defenſionem & munitionem præparentur, poſtque Sacroſanctum Paſcha cum cunctis utenſilibus competentibus ſimul congregentur; qua igitur etiam pœna digni ſunt, qui Navium detrimentum in aliquibus perficiunt? notum eſſe cupimus, quicunque aliquam ex Navibus per quampiam inertiam vel incuriam, vel negligentiam corruperit; & tamen recuperabilis ſit; is Navis corruptelam vel fracturam ejuſdem per ſolidam prius recuperet, Regiq; deinde, ea quæ pro ejuſdem munitionis fractura ſibimet pertinent, rite perſolvat. *Spelmanni fol.* 528. *expeditio Navalis.*

Moſt certain it is, that the Kings of *England* have in all Ages, by their *Writs* and *Patents*, commanded not only the *Admiral*, but the *Wardens* of the *Cinque-Ports* and

 others,

others, to arreſt and provide Ships of War, and other Veſſels, and impreſs and provide Maſters of Ships, Seamen, Mariners, and all other neceſſary Tackle, Arms,
Rot. Scotiæ 10 and Proviſions for Ships, for the defence of the Sea and
E. 3. *m* 2. to the Realm againſt foreign Enemies, or for tranſporting
17. and then of Armies paying their Freight (if not bound thereto by
to 34. *intus & dorſ.* to 28. tenure) as well as to elect and provide all ſorts of Soldiers, Carpenters, and other Officers to be aſſiſtants in their ſeveral Expeditions.

1 Eliz. cap. 13 Vide Stat. But Fiſhermen or Mariners preſſed for the Service, are
16 17. Car. 1. not to be employed as Soldiers, but only as Mariners;
c. 5. unleſs it be in caſes of great neceſſity, or bound thereunto by Tenure, Cuſtom, or Covenant.

2 & 3 *P. & M. c.* 16. *ſ.* 8. And Watermen that ſhall withdraw themſelves in time of preſſing, ſhall ſuffer a fortnight's Impriſonment, and be prohibited to row on the *Thames*.

Court of Admiralty erected by *Ed.* 3. V. The reaſon why the *Admirals* had ſuch power given them, was becauſe they being ſometimes called *Capitanei*, and *Gubernatores Flotarum*, they had their ordering and governing of the Ships of War, and the raiſing and fitting up ſuch Ships for the Navies, as they thought fit; other times called *Cuſtodes Maritimarum partium*, their duty being to provide all Naval Proviſions, as well to ſupply the King's Navies occaſions, as to gratifie any other of the King's Friends, when diſtreſs ſhould conſtrain them to
Vide Sir *Henry Spelmans* Gloſſ. *in tit. Admir.* *Lambert Archeion tit. Admiral. fol.* 42. touch in his Ports, that his Subjects might receive the like retaliation again; they were called *Capitanei Nautarum & Marinellorum*, as in reference to the deciding all differences amongſt thoſe in the King's Service, and puniſhing of ſuch as tranſgreſſed; and as the place was great, ſo the power was large, eſpecially in all things belonging to the *Navy-Royal*; in which they had the Supreme rule and government in all things belonging to it. He ſate formerly in the King's Houſe, and there kept his Court, as the *French Admirals* do at this day at the *Marble-Table*, in the King's Houſe at *Paris*.

And although there ſeems no queſtion but the King may preſs Ships, yet there have been thoſe who ſeem to doubt, if not to queſtion, whether he may preſs Men to ſerve; for my own part I think he may, my Reaſons are theſe: It is lawful for every Man to addict and yield up himſelf to whom he pleaſeth, as appears both out of the

Hebrew

Hebrew Law and *Roman* Law; why then may not any People, being at their own diſpoſe, give up themſelves to their Prince or Sovereign, ſo as to tranſcribe the right of commanding their aid and help, as often as need ſhall require (it is not here inquired what may be preſumed in a doubtful caſe, but what may be done in point of right) moſt certain ſuch a power may well be done, and that grounded on great Reaſon; as if the Common wealth ſhould happen to be invaded by ſuch a one as ſeeks not only the ſubverſion of the Government, but the deſtruction of the People, and they can find no other way to preſerve themſelves, but that the ſupream Power ſhould be veſted with ſuch a Prerogative, as to inforce or preſs the Inhabitants to ſerve in Arms in the Defence of the ſame, and the contempt of which to puniſh; or if they ſhould be oppreſt with Want, and that ſupplies of Proviſions can no ways be had, but by compelling another by force to exhibit the common Offices of humanity to a Nation in whoſe Territories a Famine rages, that the Inhabitants ſhould on ſuch extraordinary Occaſions be compelled by force to ſerve in Arms.

And this Dominion may be obtained ſeveral ways, either by a voluntary Reſignation to a Conqueror, as they of *Capua* to the *Romans*, *Our Land, the Temples of our Gods, all Divine and Humane things we yield up unto your hands, O ye Conſcript Fathers.* Again, Freedom may be granted to all by a Conqueror, except Mariners, which ſhould in Caſes of neceſſity be excepted, or that ſome Prince, who will not ſuffer any Mariner to go out of his Dominions, without ſubjecting themſelves to ſuch a reaſonable command, beſides the Majority of Nations on ſuch grounds, may abdicate from a part of them the entire Freedom of that Member.

Nor are there examples of this kind wanting; the *Germans* are every one Maſter of his own Houſe, but are almoſt on every occaſion ſubject to their *Lords*, eſpecially in their Goods. The *Iriſh Coſherers*, which were reprehendinations, when the *Chief Lord* and his Retinue came to his Tenant's Houſe, they fed upon his Proviſions till they were ſpent, all being ſolely at their Devotion. And as to the Sea, the King of *Britain* may at this day reſtrain Merchants or Mariners to paſs out of the Realm, without Licence; *Tacitus.* *Coke* 2. *Inſtit. fol.* 358. 2. *E.* 1. *Memb.* 18. *Rott. Pat.*

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cence; and the various tenures that are introduced, which is preſumed were ſince the *Conqueſt*, were no other but the Will of the *Conqueror*; for the right is not meaſured by the excellency of this or that form, but by the Will.

2 *E.* 1. *m.* 17. *Rot. fin.* 31 *E.* 1. *num.* 44. *Ro. Pat.* 17. *H.* 6. *Ro. Cla. in dorſ. Vide* the Caſe of *Bates*, in *Lane*'s Reports, *fol.* 4.

VII. And though it hath been conceived by ſome, that the King cannot preſs Men to ſerve in his Wars, giving their Reaſon, that of old he was to be ſerved either by thoſe that held by tenure, thoſe that covenanted by Indenture to provide Men, or thoſe who contracted with the King's Officers for Wages and entered into Pay, or thoſe that were in Priſon for the King's Debts; but that only extended to thoſe Wars that were by Land: not one word in all thoſe Acts, or Muſter *Rolls*, relating in the leaſt to Mariners; and yet what vaſt Fleets were in thoſe Days? But on the other Hand it hath been always accuſtomed to preſs ſuch ſort of Men for the Naval Expeditions. The ancient Records that mention ſuch Perſons ſubject to be preſs'd by Law is that of 29 *E.* 3. commonly called * *The Inquiſition of Queenborough*, wherein it was expreſly in charge amongſt others, to inquire of thoſe Mariners that were preſſed for the King's Service and deſerted the ſame: So likewiſe by thoſe other Articles tranſlated by *Roughton*, it is in expreſs charge to the *Jury* to preſent thoſe that being preſt to ſerve, brake the King's Arreſt, in order to their Puniſhment; and in thoſe days it was eſteemed an high offence: and the Oath which the *Jury* then took being impanelled, was this.

1 *Inſt.* 71. *a.* 6. *do.* 270.

And the Stat. which provides puniſhment for thoſe Watermen who ſhall hide themſelves, does evidence what the Common Law was as to the right of preſſing, which certainly would never puniſh thoſe whom they could not preſs.

This here ſee my Lord the Admiral, that I Jonathan Naſh ſhall well and truly enquire for our Lord the King, and well and truly at this time then ſerve at this Court of th' Admiralty, preſent as moch, as I have acknowlech, or may have by information of eny of my Fellows, of all mane Articles or Circumſtances that touchen the Court of the Admirate and Law of the Sea, the which ſhall be grate to me at this time; and thereupon ſworn or charged, and of all other that may renew in my mind, and in ſhall for nothing lette, that is for to ſay, for Franchiſe, Lordſhip, Kinreden, Allience, Friendſhip, Love, Hatred,

* 2. *Apr.* 49 *E.* 3. in the Black Book of the *Admiralty* 32, 33. 34. *Art.* and *fol.* 62. *Art.* 16.

Hatred, Envy, Enemitee, for dred of loſt of Goodnee, for non other caſe that I ſhall ſoe doe, the King's Counſeils, my fellows, mine owne, will and truly hele with out fraude or malengyn, ſo God me help at the holy dome, and by this Book. The Black Book of the Admiralty *fol.* 17.

VIII. And as the enquiry was ſtrict, ſo was the puniſhment very great: *Item, qui fugiet à Domino vel ſocio ſuo pro timiditate belli vel mortis in conductione Heretochii ſui in expeditione navali vel terreſtri, perdat omne quod ſuum eſt, & ſuam ipſius vitam, manus mittat Dominus ad terram quam ei antea dederat.* *Lamb. inter Leg. Edovar. f.* 139. 13 *Car.* 2 *cap.* 9. Ar. 17.

IX. In the Service of the King two ſorts of perſons were always capacitated to attend the *Navy Royal* in their Expeditions, the one a Salt-water Land-Soldier, the other a compleat Mariner or Sailer: It was a doubt, whether ſuch a Soldier, departing from the ſervice, were ſubject to any other puniſhment than that of *Martial Law*, which can at no time be executed in *England* but when the King's Standard is in the Field; thereupon it was provided, *That if any Soldier being no Captain, immediately retained with the King, which ſhall be in wages and retained, or takes any preſt to ſerve the King upon the Sea, or upon the Land beyond the Sea, depart out of the King's ſervice without licence of his Captain, that ſuch departing be taken, deemed, and adjudged Felony. And that all the Juſtices in every Shire of* England, *where any ſuch Offenders be taken, have power to enquire of the ſaid offences, and the ſame to hear and determine as they do and may do of Felony,* &c. *expreſſed in the King's Commiſſion to them made, as though the ſame offences were done in the ſame Shire; and alſo that the departing of ſuch Soldiers, and alſo their Retainers, if it be traverſed, be tried in the ſame Shire where they are for ſuch a Cauſe arreſted and arraigned.* The Juſtices have here a concurrent power to enquire and try, but it does not ſhut out the Severeign Courts, or hinder, but the King may try them upon a Commiſſion of Oyer and Terminer, or Goal-delivery. It was a doubt conceived by ſome of the late Judges, if a Man had run from his Colours at *Plymouth*, and afterwards was taken in *Middleſex*, and committed to *Newgate*, whether after a Bill is found in *Middleſex*, the Juſtices of Gaol-delivery for *Newgate* could try him; but it was ruled more than once by the greater 7 *H* 7. *cap.* 1. 2. *Cro. Car.* 71. 3 *H.* 8. *cap.* 5. §. 2.

number of the Judges, they might; and ſo have the Precedents been always ſince the making of this Statute, and upon the like Reaſon, that a Man that takes a ſecond Wife, hath by the Statute the ſame directions to be tried in the ſame Shire where he is taken; yet if taken in *Middleſex*, was always tried at the *Old-Baily* in *London*.

Theſe Statutes were made, becauſe the Statute of 18 *H.* 6. *cap.* 19. was looked upon not to be ſufficient, for that that Act had reference only to the ancient Tenures, and thoſe that covenanted with the King to provide Soldiers; whereupon a queſtion afterwards ariſing, whether ſeveral who having then taken preſt Money to ſerve the *Queen* againſt the Rebels in *Ireland*, and had departed and withdrawn themſelves from the Service, ſhould be within thoſe Statutes, in regard ſome doubt ſeemed to ariſe on the ſame; but it was reſolved by all the Judges of *England*, that thoſe two Statutes of 7 *H.* 7. *Cap.* 1. and 3 *H.* 8. *Cap.* 5. are all one in effect, and were perpetual Acts: the great doubt and queſtion, whether the Statute of 18 *H.* 6. *Cap.* 19. did extend to Mariners and Gunners ſerving on the Seas, and taking Wages of the King, was in Parliament not long before cleared in theſe words: *That the ſaid Statute made in the eighteenth Year of the Reign of* H. 6. *in all pains, forfeitures, and other things, did, doth, and hereafter ſhall extend as well to all and every Mariner and Gunner, having taken, or who hereafter ſhall take preſt or wages to ſerve the Queen's Majeſty, her Heirs and Succeſſors to all intents and purpoſes, as the ſame did or doth unto Soldiers, any diverſities of opinion, doubt, matter, or thing to the contrary thereof notwithſtanding*: But now Mariners deſerting the Sea-ſervice are particularly within the Proviſion of 13 *Car.* 2. *Cap.* 9. which hath made the Offence Death; but the Trial is by a *Court Marſhal*.

43 *Eliz.*

Coke 6. *part. fol.* 27.

Raſtal doubted in this Abridgment.

Artic. 17.

And Land-Soldiers, though in time of Peace, are likewiſe within the Statute of 7 *Hen.* 7. *Cap.* 1. and 3 *Hen.* 8. *Cap.* 5. if they take any preſt Money to ſerve the King upon the Sea, or upon the Land, or beyond the Sea, and ſhall deſert the Service; but that is Inquirable according to the Courſe of the *Common Law*, where if the party ſhall depart without Licence, he ſhall ſuffer Death, without benefit of the Clergy.

X. If

X. If ſuch Perſons ſhall ſo deſert the Service, it hath been a Queſtion, whether a private Perſon under the ſame obedience meeting with ſuch a Deſerter, might not put him to death; it hath been conceived that he might, and the act is lawful, and the party that ſlays him hath a true Right before God, as impunity before Men: But that is to be underſtood partly by the Words, and partly by the Letter of the Law: For if the Law gives indulgence to Paſſion, it takes away humane Puniſhment, and not the Fault; as in caſe an Husband kills an Adulterous Wife or the Adulterer * in the Act; moſt certain it is a Provocation in the higheſt nature, and will juſtifie the Slayer: But if the Law reſpect the Danger of future Evil, by delay of Puniſhment, it is conceived to grant right and publick power to a private Man: ſo that he is not then in the capacity of a private Man.

Non ſolis ducibus aliiſque potentibus innaſci ſolet, atque immorari bene agendi propoſitum, ſed cuique volenti & licet & honeſtum eſt ejus quæ vivas Reipublicæ malo commoveri, & publicas utilitates pro ſuis viribus promovere. Vide Grotium l. 2. c 10.

* That is as to entitle him to *Clergy*, and ſo it was rul'd by all the Judges in *B R. M.* 23 *Car.* 2. in the Caſe of one ——— found ſpecially at *Surry* Aſſizes before Mr. Juſtice *Twiſden*, who ſlew the Adulterer in the very Act. *Vide Auguſt. de Civit. Dei citatum.* C. *quicunque, cauſa* 23. *qu.* 8.

And upon that very Reaſon Queen *Elizabeth* denied the conſtituting of a *Conſtable*, for the Trial of Sir *Francis Drake*, who ſtruck off the Head of *Doughty in partibus tranſmarinis*.

An. 25 *Eliz. Co. Litt. fol.* 74. *b.*

XI. Hence it is that every Man hath a Licence given him to oppoſe force againſt plundering, and pillaging Soldiers: and the next the ſubſequent Law about Deſerters ſaith, *Let all men know they have a power given them againſt publick Robbers and Deſerters that run from their Colours, and all are Miniſters of Revenge for the quiet of all*; to this purpoſe is that of *Tertullian*, *Againſt Traytors or publick Enemies every Man is a Soldier*: and herein differs the right of killing of Exiles and Outlaws, or thoſe whom they call *Banditoes*, from thoſe kind of Laws. becauſe there proceeds a ſpecial Sentence, the Judgment of Baniſhment or Outlawry being promulgated; but here a general Edict, the Fact being evident, obtains the force of a Judgment or Sentence pronounced: the Judgment of the latter muſt be according to the *Civil Law*, which yet remains ſtill in force, as to the Trial of ſuch Deſerters;

Cod. Juſtin. tit. quando liceat unicuique.

It was in force in *England* till the beginning of the Reign of *Ed.* 3. time *Co. Inſt.* 128. *B.* 12 *H.* 4. *fol.* 4. 5. 37 *H.* 6. *fol.* 3. *Mir. c.* 4. *S.* 4.

ters; which Impunity for ſuch killing, ſeems allowed of at this day by that Law.

XII. Caſes relating to the Juriſdiction of the Admiralty as to Matters ſueable there, or at the Common Law.

Tryal where the Original Contract ariſes.

The Trial ſhall be where the Original Contract is made, which if in *England*, tho' the ſubſequent Matter to be done be upon the Sea, the Trial ſhall be at the *Common Law*. But if the contract and what is to be done all of it is beyond Sea, it cannot be tryed at Law here, but in the *Admiralty*; but if part be to be done here and part beyond Sea, ſo as it is mixed; then it ſhall be tryed at Law. As an Action upon the Caſe upon a Policy of Aſſurance made at *London*, that a Ship ſhall Sail from *Melcom Regis* in the County of *Dorſet* to *Abville* in *France*, ſafely, *&c.* And the Plaintiff declared that the Ship in Sailing towards *Abville*, *viz.* in the River of *Some* in *France*, was arreſted by the King of *France*, and the Iſſue was whether the Ship was ſo arreſted or not; the Tryal was by *Niſi Prius* in *London*, and reſolved to be well brought, tho' 'twas objected that this Iſſue ariſing merely from a Place out of the Realm, could not be tryed at Law, for the Aſſumpſit being at *London* was the ground and foundation of the Action, and therefore ſhall be Tryed here, for otherwiſe it could not be Tryed at all. Cited in *Dowdale Caſe 6. Rep.* 47. *b. Godbolt* 76. and 204.

And ſo if the Contract be made at Land, tho' beyond Sea, the Trial ſhall be at Law, tho' what is to be done, be all of it beyond Sea, by laying the Contract made at a Place in *England*, as in *Burdeux apud Iſſlington in Com. Middleſex*. So is the Caſe of *Slaney* and *Clobery* againſt *Cotton*, where the Plaintiff ſued the Defendant in the *Admiralty* Court upon a Promiſe made in *Barbary*, to Sail from *Sirborona* in *Barbary* to *Ricumpta* in *Brazeil*, &c. upon ſuggeſtion that the Contract was made in *London*, Prohibition was granted: for by *Jones* the performance of the conſideration does not give the Action without the Contract, and this was made at Land, tho' beyond the Seas, which may be ſuppoſed to be done in a place in *England*. 2. *Rolls Rep.* 486. See *Tucker* and *Caff's* Caſe in the ſame Book 492. and 497. and 2. *Brow.* 10. 11.

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A Contract was made at *New-Caſtle* that a Ship ſhould Sail from *Yarmouth* to *Amſterdam*, Debt was brought upon this Contract, in the Court of *New-Caſtle*; adjudged, that the Action would not lye there, being a limited Juriſdiction, which ſhall not have conuſance of any matters done in *partibus tranſmarinis*, but only the Courts at *Weſtminſter*, *March* 3.

Matters beyond Sea not Triable in an inferior Court.

If one libell in the Court of Admiralty for a thing done upon the Land, and it appeareth upon the Libell, that the thing was done upon the Land, and they notwithſtanding that hold Plea of it, A *Præmunire* lyeth upon it; but if the ſame do not appear within the Libell, then it is not within the Statute of the 13. and 15. of *R.* 2. c. 5. but a Prohibition ſhall only iſſue, 2. *Leond.* 183. In Sir *Richard Buckley*'s Caſe.

Præmunire for ſuing in the Admiralty.

The Admiralty hath Juriſdiction of *Flotzan*. *Treſilian* againſt *Jones* 2. *Keeble* 361.

Admiralty hath Juriſdiction of *Flotzam*.

A *Dutch* Ship was broken by a great Tempeſt in a Creek of the Sea, *Infra Corpus Comitatus de Dorſet*, the Sailors upon pretence that the Goods in the Ship were *bona peritura* procured a Commiſſion of Seal out of the Admiralty Court to ſell them, and the true Owners to prevent ſuch Sale, brought a *Superſedeas*, and upon ſhewing the Libell to the Court a Prohibition was granted. (1) becauſe the Cauſe of Action accrued *infra Corpus Comitatus*. (2) Becauſe the Sale of the Goods was good, as *bona peritura*. *Culmer* againſt *Brand*. 2 *Sid*. 81.

Superſedeas to the Admiralty.

One having taken a Ship as Prize which had *bona peritura* entred into a Recognizance with ſureties before the Judges delegate to bring the Money raiſed by Sale of the Goods into the Admiralty Court before ſuch a day, if they upon a Plaint there depending did not adjudge the Ship and Goods to be Lawful Prize, which they adjudged Lawful Prize, and after at another time cited the Owner before the Judges of the Admiralty, and for his not coming and bringing the Money at the day, they threatned to ſue Execution againſt the Bail or Sureties who were Merchants of *London*, Prohibition was praied, for by their firſt Judgment or Sentence, their Recognizance was diſcharged, and they ought not by Colour of this to endanger the Credit of Men of Reputation; but the Court would not grant

Unjuſt Sentence in the Admiralty where they have original Conuſance is no Cauſe for a Prohibition.

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a Prohibition, for they ſaid an unjuſt Sentence of the Ad miralty in a Cauſe of which they have Original Conu ſance, is not a Cauſe of Prohibition. As if Tythe which in verity are paid, are found not paid i the Spiritual Court, yet a Prohibition lyes not, and her the Judges Delegate have ſole Power upon this Recog nizance, to make Execution or defeat it. *Becks* againſ *Chelſcocke* 2 *Sid.* 152.

Suit there for not ballaſting a Ship.

The Corporation of Trinity Houſe under pretenc of Letters Patents from Queen *Elizabeth* for the Ballaſt ing of all Ships within the Bridge of *London* and the Sea and that no Ship ſhould take Ballaſt of any other but o them, ſued one *Boreman* (a *Dutch* Man) in the Admiral ty for taking Ballaſt of another, within the Place afore ſaid. *p. Curiam* the Place being alledged to be at *Rat cliffe*, a Prohibition was granted; Reſolved that the Let ters Patents were void, for that thereby a Charge is rai ſed upon the ſubject for the private gain of the Houſe, for they would not Ballaſt a Ship under 2d. *p. Tun. Bore man's c.* 2. *Brown.* 13.

Stat. 13. 2. 2. *h.* 4. and 11. *h.* 2.

In the Caſe of Sir *Hawkins* Vice Admiral of the Coun ty of *Devon* who was proſecuted in the Starr-Chambe for abetting and comforting *Hull* and other notorious Pi rates. It was there reſolved that by the Common Law the Admirals ought not to meddle with any thing done within the Realm, but only with things done upon th Sea, and alſo by the Stat. of 13 *R.* 2. *c.* 5. 2. *h.* 4. *c.* 11 and 11. *h.* 2. *c.* 3.

It was likewiſe reſolved, that the ſaid Statutes are t be intended to hold Plea, and not of a power to awar Execution; for the Judge of the Admiralty notwithſtand ing theſe Statutes may do Execution within the Body o the County.

The Court of Admiralty is not a Court of Record becauſe they proceed there according to the *Civil Law* 13. *Rep.* 51.

Where one admits the Juriſdiction of the *Admiralt* by pleading there; no Prohibition ſhall be granted. *Jen nings* againſt *Audley*, 2. *Brow.* 30. 12. *Rep.* 77.

Suit there for Contract upon Land Prohibition.

Cradock bought divers things within the Body of th County, which concerned the furniſhing a Ship, as Cor dage, &c. the Vender ſued him in the *Admiralty* Court

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a Prohibition was granted, 2 *Brow.* 37. *Cradock*'s Caſe, *Owen* 122. 3. *Keeble* 552. *Merryweather* againſt *Mountford.*

The Defendant being Maſter of a Ship, of which the Plaintiff was Owner, the Ship was taken by Pyrates upon the Sea; and to redeem himſelf and the Ship he contracted with the Pirate to pay him 50 *l.* and pawned his Perſon for it, the Pirate carried him to the Iſle of *Scilly*, and there he paid it with Money borrowed; and gave Bond for the Money at his Returne, after the Redemption both of the Ship and himſelf he ſued in the *Admiralty* for the 50 *l.* and had a Sentence for it, and thereupon a Prohibition to the *Admiralty* was prayed but denyed, becauſe the Original Cauſe began upon the Sea, and whatever followed was but acceſſory and conſequential. *Hard.* 183. *Spark* againſt *Stafford.* Laws of the Sea. 427. Prohibition was granted to the *Admiralty* Court on the 22d. and 23d. *Ca.* 2. *cap.* 26. *Sect.* 11. in Suit there for the Forfeit of a Ship on Selling Wares in *Ireland* without breaking Bulk, being put into *Ireland* from *America*, by contrary Winds, this being Triable in the Plantations or any Court of Record in *Weſtminſter.* *Pidgeon con. Trent*, 3. *Keeble* 640, 647, 651. (*vide Librum.*)

1. *Lev.* 243. *Telv.* 135.173. 1. *Sid.* 320. 2. *Saun.* 260. 2. *Lev.* 25. 1. *Ven.* 173, 308. 1. *Sid.* 367. 3. *Cro.* 685.

A Maſter of a Ship agreed with certain Merchants concerning a Voyage and Received Orders from them to lay in Proviſions of Meat and Drink, and to provide Mariners, *&c.* and after the Voyage was finiſhed, the Merchants refuſed to pay the Maſter of the Ship, what they had agreed for, upon which he Libell'd againſt them in the *Admiralty*, Prohibition was granted upon the Statute of 2. R. 2. *cap.* 3. the Contract being upon Land, and denied the Caſe. *Hill.* 8. *Ca.* 1. *Cro.* 296. which ſaith that when a Thing is in its Nature Maritime as in the Caſes of Mariners Wages, the Admiralty ſhall have the Conuſance of it. *Woodward* againſt *Boniſhan*, *Raymond.* 3. and 3 *Levinz.* 60. *Coke* againſt *Cretcher*, &c. 2 *Vent.* 181.

Prohibition does not lye for Mariners Wages.

If a Contract or Obligation be made upon the Sea, yet if it be not for a Cauſe Marine, the Suit upon this, ſhall be at *Common Law*, not in the *Admiralty*. *Hob.* 11.

Contract not Marine made at Sea.

If the Original Contract be made at Sea, on a Marine Cauſe, and after reduced into Writing at Land, the *Common*

Contract at Sea ſettled at Land.

mon Law not *Admiralty* ſhall have the Conuſance. *Hob.* 79. 212. *Palmer* againſt *Pope.*

If a Charter Party be made in *England* to do certain things in divers Places upon the Sea, tho' that no Act is to be done in *England*, but all upon the Sea, yet no Suit ſhall be in the *Admiralty* for NonPerformance of the Agreement; for the Contract is the Original and is out of their Juriſdiction, and where part is Triable at *Common-Law*, and part in the *Admiralty*; the *Common Law* ſhall be preferred. *Maldonado* and *Slaney* 1 *Roll Abr.* 532. 533.

Common Law prefered.

It was moved for a Prohibition to the *Admiralty*, becauſe the Libell was to execute a Sentence of the Alcade which is the *Admiralty* at *Malago* in *Spain*, upon a thing done within a Port there, and after a Rule for a Prohibition *niſi*, 'twas moved that no Prohibition ſhould be, for tho' this Court will not execute the Sentences of any Foreign Court, in as much that it is governed by a diſtinct Law, yet theſe of the *Admiralty* may, and this is their uſe to do ſo, for this that all the *Admiralty* Courts in *Europe* proceed by the ſame Law, *viz.* the *Civil Law*, and *Wibrel* and *Wiat*'s Caſe 5. *Ja.* was Cited, to be adjudged accordingly. But upon Reading the Libel in the Principal Caſe, it appears, that the Sentence was not Definitive, but Interlocutory concerning a Matter that ſounds as an Action upon the Caſe, and no Sum ſet; and alſo the Alcade is not as an *Admiralty* there, and for this a Prohibition was granted. *Jurado* and *Gregory*, 1. *Sid.* 418. 1. *Levinz.* 267. 1. *Vent.* 32. and 2. *Keeble* 511, 610.

Prohibition to the Admiralty for proceeding to execute an interlocutory Sentence of a Foreign Admiralty.

1 *Ro. Ab.* 530. *pl.* 12. *Raym.* 473.

Motion for a Prohibition to the *Admiralty*, for that they Libell'd againſt one for reſcuing a Ship, and taking away the Sails from one that was executing the Proceſs of the Court, againſt the ſaid Ship, and for that in the preſence of the Judge and Face of the Court, he aſſaulted and beat one, and ſpake many Opprobrious Words againſt him. Now ſeeing that theſe Matters were determinable at Law, the Ship being *infra Corpus comitatus*, and they could not adjudge damages to the Party, or Fine or Impriſon, a Prohibition was praied, but denyed, for they may puniſh one that reſiſts the proceſs of their Court, and may fine and impriſon for a contempt tho' they are no Court of Record, but if they ſhould proceed

Reſcus and Contempt triable there.

proceed to give Damages, they would grant a Prohibition *quoad* that. *Sparkes, &c.* againſt *Martyn.* 1. *Vent.* 1.

Goods taken by Piracy, Triable there tho' ſold at Land.

Telv. 135, 173. *Hard.* 183. 1. *Sid.* 320, 367. 2 *Saun.* 260. 2 *Lev.* 25. 1 *Ven.* 173.

A Prohibition prayed to the *Admiralty*, where there was a Libell for a Ship taken by Pyrates, and carried to *Tunis* and there ſold, for that it did not appertain to the Court to try the Property of the Ship being ſold upon Land. *Curia* in regard it was taken by Pirates, it is Originally within the *Admiral* Juriſdiction, and ſo continues notwithſtanding the Sale afterwards upon the Land. Otherwiſe where the Ship is taken by Enemies, for that alters the Property. Contrary to my Lord *Hobart* in the *Spaniſh* Ambaſſador's Caſe 78. 1. *Vent.* 308. Anonymus. 3. *Cro.* 685.

Ships found at Sea belong to the Admiral.

If Ships or Boats are found on the Sea or upon the Coaſt, without any Living Creature therein, and no Man claiming the ſame within an Year and Day, the finder formerly uſed to have one Moity, and the Prince the other Moity, but now 'tis left to the diſcretion of the Admiral, what the finder ſhall have for his Travail, Charges, Danger. And if the finder conceal ſuch Goods, whether belonging to the Ship, as Anchors, Timber or other Goods, he ſhall not only loſe his Part, but be fined at the Will and Pleaſure of the Admiral.

Royal Fiſh *Deodands.*

If Whales or other Regal Fiſh, Ships or Boats without any Living thing in them, be driven by force of Wind or Waves only, to any Coaſt or Land, then all doth belong to the Admiral, *Lex Mercat.* 120.

See more of this Matter. 4. *Inſt.* 134, *&c.* of the Court of *Admiralty.* 1. *Roll. Abr.* 528, *&c.* Title Admiralty.

Trover after Sentence will not lye.

After Sentence in the *Admiralty* Court for the ſeizing of a Ship, Trover and Converſion at Law will not lye, *Beake contra Thynwhitt* Laws of the Sea. 425.

Acquittal of Murder in the Admiraly in a Foreign Kingdom, he ſhall not be Tried again here.

Hutchinſon killed one *Colſon* in *Portugal*, and was acquitted there of the Murder, the Exemplification of which Acquittal he produced under the Great Seal of that Kingdom, which by the Opinion of all the Judges was ſuch an Acquittal by their Law, that he could not be Tried here again.

The *Admiralty* hath not Juriſdiction of *wrecke.* 5. *Rep.* 106. 2. *Inſt.* 167. 4. *Inſt.* 154. 15. *R.* 2. *c.* 3.

Caſe for ſueing in the Admiralty for matters at Land.

Caſe upon the Statutes. 13. *R.* 2. *c.* 5. 15. *R.* 2. *c.* 3. and 2. *h.* 4. *c.* 11. for ſueing in the *Admiralty* for matters done

upon

upon the Land, and declared that the Plaintiff was going from the Port of *London*, with his Ship laden with Merchandizes, and that the Defendant brought a Suit in the *Admiralty* to ſtay the Ship, till caution ſhould be given, that ſhe ſhould not Traffick with Infidels, within the Limits of the Charter of the *Eaſt-India* Company, and that they procured the Ship to be arreſted by Proceſs of the *Admiralty*, and to be detained, by which the Plaintiff loſt the Profit of his Voyage, upon not guilty pleaded, a Special Verdict was found, *viz.* they found the Charter of the *Eaſt-India* Company of 13. *Ca.* 2. by which they are incorporated, and had the ſole Trade to the *Eaſt-Indies*, granted to them with a Prohibition to all others to Traffick with *Infidels* there upon pain of Forfeiture of Ship and Goods, and that the Plaintiff had prepared a Ship and Goods to go to the *Eaſt-Indies* to Traffick with Infidels within the Limits of the *Eaſt-India* Company, upon this they Petitioned the King in Council to ſtay the Ship, where an Order was made to the *Admiralty* to ſtay the Ship by their Proceſs, which iſſued accordingly, and the Ship was ſtay'd, *prout*, *&c.* all which was done by the Defendants as Agents of the Company, and they as Agents paid the Fees of the Proſecution, and if guilty damages for the Plaintiff in duplo 1500 *l.* ſo upon Araignment judgment for the Plaintiff and an Error affirmed. *Sands* againſt Sir *Joſias Child* and others. 3. *Levinz.* 351. *A like* Caſe 1. *Vent.* 47. *Home* againſt *Ivie.*

4. *Inſt.* 138.

CHAP.

Chap. VII.

Of Dominion eſtabliſhed by Treaties of Alliance in general.

I. Of *Treaties their ends.*
II. Of *the matters conſiderable in the making of them, and how the overtures are made.*
III. Of *the various ſort of Treaties, and firſt of thoſe by interview.*
IV Of *the pretexts generally made to obtain ſuch Treaties.*
V. Of *Princes equal the honour is to be paid by him in poſſeſſion.*
VI. Of *Treaties by Princes unequal.*
VII. Of *Treaties ſecret and open.*
VIII. Of *things requiſite for Princes during ſuch Treaties.*
IX Of *Places proper for Treaties.*
X. *Princes where obliged to treat perſonally, and where not.*
XI. *Deputies their demeanor generally conſidered in Treaties.*
XII Of *the Clauſes generally to be conſidered in Treaties general and particular.*
XIII. Of *the nature of Treaties generally conſidered as to their ends, and where they determine by the Death or Diſpoſſeſſion of a Prince, and where not.*
XIV. Of *Treaties to what end, and how they have been ſtrengthned in* England.
XV. Of *the Cauſes ordinary procuring ſuch Leagues.*
XVI. Of *Leagues by way of Mediation tending to the procuring of a general Peace with Warranty.*
XVII. *Conſiderations on Leagues defenſive and offenſive, and of the Advantages and Diſadvantages thereof in reference to the Eſtate confederate.*
XVIII. *Leagues defenſive conſtrued offenſive in favour of the oppreſt.*
XIX. *Contribution, the difficulty in regulating the ſame to the ſatisfaction of the Perſons intereſſed.*
XX. Of *Leagues concluded by Deputies, and the Difficulties uſed to delay, by which deſigns may ſecretl be carried on.*
XXI. *Conſideration had on Leagues made for carrying on ſome particular Enterprize.*
XXII Of *the Cauſes that generally occaſion a Rupture.*
XXIII. Of *the Obligation on Confederates in reference to mutual Succours.*
XXIV Of *Aid granted to particular and common Allies when invaded b one another, and of Protection granted a People when oppreſſed, whether Aid to ſuch may be conſiſtent with a League.*
XXV. *Whether the Oath taken for the Performance of the League be perſonal, or binds the Succeſſor, and of the Interpretation of the ſame.*
XXVI. Of *Leagues made with Princes when driven out of their Countries, whether they remain valid and firm.*
XXVII. *Whether Leagues may be entred into by Chriſtian Princes with Infidels.*

I. Treaties are occaſioned by a wiſe and prudent Care of inſpecting the Motions of Neighbours and of their

their Affairs, the which are generally reduced to theſe Three Heads upon the Conſiderations,

1. How a Prince ſhould govern himſelf with his Neighbours.

2. In gaining a Credit among them, and to have a part in their Deliberations.

3. Is the main, which is to pierce into his Neighbours deſigns; for thoſe Centers being diſcovered, a Prince eaſily knows how to draw his Lines.

II. In Treaties, the firſt thing to be conſidered is the manner of making the Overture; and therefore it may ſo happen, that of two Princes who are Enemies, the one will not ſeek unto the other for an accord; therefore the general *Medium* is, that the motion be propounded by ſome greater Prince, or by ſome Neighbour that is a Friend to both,* and ſometimes the Miniſters of two Princes meeting accidentally, if they be imployed, yet propound an Accommodation. When a Prince or State is exaſperated with another, and having gotten an Advantage, will often refuſe to treat any where but in his own Country, nor that unleſs firſt ſought to by a ſubmiſſive Requeſt, as by Letter, *&c.* So they of † *Holland* and *Weſt-Frieze-land* conſidering the miſerable Diſtreſs and incorrigible Diſorders of their People, did ſubmit thus to confeſs their Errors.

* *Argenton* and a Steward of the Duke of *Mantoua* meeting at *Creal Carragio*, to condole in their Maſters names for the Death of the Marqueſs of *Forcat*, made an overture for the Treaty of Peace betwixt *Charles* the Eight and *Lewis Sforſe*. † *March* 8. 1653. by order of thoſe States, ſubſcrib'd *Herbert Van Beaumont*, and afterwards by a Letter from the *States-General* praying a Neuter place, *April* 30. 1653. then by a Petition $\frac{2}{3}\frac{c}{o}$ *June* after. *Leo ab Aitzma fol.* 817, 818, 825.

III. Treaties are acted either by the interview of Princes, or by perſons ſufficiently commiſſionated for that purpoſe.

Thoſe that are by interview, have been often diſapproved, though often practiſed; but that depends rather on the Eſtate of Affairs, and the conformity and diverſity of Honours, and manner of living of the Princes and their People, than of the interview: that of *Lewis* the Eleventh with Duke *Charles of Burgundy*, and of the ſame King with *Edward* the Fourth of *England* paſt fairly: and in all ſuch Treaties they govern themſelves in reference to their ſupplies, according to the Confidence which they repoſe in each other. † But thoſe interviews of Princes have ever been

† *Jugurtha* taken by his Fa-

been obſerved dangerous; for Princes meaſure their quality, not by the extent of their Dominions, but by the abſoluteneſs of their Power: So that he that is Supream and Independent in his own Country, counteth himſelf equal to any other Prince, how great ſoever. Perchance ſome youthful Kings may diſport and ſolace themſelves in one another's Company, whilſt yet Pleaſure is all the elevation of their Souls; but when once they grow ſenſible of their own Greatneſs, (a Leſſon they will quickly learn, and ſhall never want Teachers) then emulation will be betwixt them, becauſe at their interview they cannot ſo go in Equipage, but one will ſtill be the foremoſt, either his Perſon will be more proper, or Carriage more Courtlike, or Attendance more Accompliſhed, or Attire more Faſhionable, or ſomething will either be or be conceived to be more Majeſtical in one than the other: And Corrivals in Honour count themſelves eclipſed by every beam of State which ſhineth from their Competitor; therefore ſome hold the beſt way to keep great Princes together is to keep them aſunder, accommodating their Buſineſs by their Embaſſadors, leſt the meeting of their own Perſons part their Affections, as it fell out between King *Richard* of *England* and *Philip* of *France*, and *Maximilian* the Firſt and *Lewis* the Twelfth.

ther-in-Law *Bocchus* and delivered to the *Romans*; *Charles* the Seventh of *France*, at a perſonal Treaty with the Duke of *Orleans*, ſlew the Duke, though a Sovereign Prince. *Mayer lib.* 15. *Phi. Comines lib.* 4. *cap.* 10.

Richard Hoveden in Rich. 1. *fol.* 666.

IV. It is preſumed, that the Perſonal Treaties of Princes are not for matters ſmall and trivial; therefore it is an undoubted Maxim, *That as Jealouſies may be increaſed amongſt Neighbours, by reaſon of ſuch perſonal interviews, ſo they muſt find out ſome apparent and important pretext, which being made known and publiſhed to remove the Jealouſies of their Neighbours, they may then under ſuch colour and ſhadow, treat the moſt ſecret of their Affairs.* So Pope *Clement* the Seventh under the borrowed Pretext of a general peace and League againſt the *Turks*, (which ſounded pleaſingly in the Ears of all Princes) at *Marſeilles* concluded the Marriage of his Niece with *Henry* the Second of *France*.

V. But if of two Princes, the one goes home unto the other, he is bound to do him the Honour of his Houſe; And if the Prince be inferiour to him, he commonly ſends forth ſome of the principal Officers of his Court to receive him; but if he be his equal in Quality, as being both

Kings, although there be ſome debate betwixt them for precedence, if he come firſt to the place where the Treaty is to be made, he muſt go in Perſon and not by Proxy.

Vide Æmilius Paulus his Hiſtory of *France* and *Ferron* his ſupply of the ſame, of the like of the Duke of *Orleans*, afterwards *Lewis* 12 *th* upon the failer of iſſue male of *Charles* the 8*th*.

In the interview that was between *Lewis* the Twelfth and *Ferdinand of Arragon* at *Savona* (which then belonged unto the *French* King) *Lewis* the Twelfth at the approach of *Ferdinand's* Galley (before he could land) enter'd into it, accompanied only with his *Guard*, to teſtifie his confidence, and thereby to aſſure King *Ferdinand* of that which he had promiſed he ſhould find in him; and at their going to Land, King *Lewis* left the Right hand to *Ferdinand*, who lodged in the Caſtle, as the moſt Honourable place, and himſelf went to the *Biſhoprick*.

VI. By the Laws of *Treaties*, when two Princes unequal in Quality parley, the Inferiour is to come firſt to the place of congreſs there to attend the Greater; yet the contrary hath been moſt commonly obſerved upon this very reaſon, that he that is leſs ought firſt to wait on the Greater, and from thence go to the place appointed for the Parley; and this was particularly done at the interview of Pope *Clement* the Seventh and King *Francis* the Firſt, although that *Marſeilles* were in the King's Subjection.

VII. Again, Treaties by thoſe that are ſufficiently commiſſionated for that purpoſe, are to act either ſecretly or openly. Treaties cloſe or Secret are uſually made in order to the compleating or ſettling of Leagues between two Princes or States, ſometimes by entertaining him with whom they treat under ſuch a Pretext, to deceive him in the end, at other times to ſurprize an Enemy, or to aſſure a Prince of two Enemies, treating with one ſecretly, the other openly, and the like. Theſe are the ordinary Policies among Princes, and wherewith the wiſeſt of Kings †, and the moſt knowing Councils have been deceived and abuſed even to accept of a Treaty, when at the ſame time the Propoſer hath no other thoughts than to betray them: the *Spaniards* have been famous at theſe Projects. Memorable was that deſign of theirs to interrupt the League which was ready to be made between the Princes of *Italy* and Pope *Clement* the Seventh after the Battle of *Pavia*, propounding unto the Pope to treat and accord, the which not only hindred the League, and ſtaid the preparations

† So *Maximilian* and *Ferdinand* having twice abuſed *H.* 8. propoſed a third, which was that he would reſign up the Imperial Crown to him; the Reſignation is ſent

Preparations of War which he might make, but alſo cauſed him to diſcharge the Troops which he had drawn unto him for his ſafety. So *Bourbon*, General of the Imperial Army, entertained the Pope with an accord, whilſt his Army marched to the Walls of *Rome*.

to *England* and approved, *H.* 8. is to come to *Aquiſgrave* to receive the Crown, and *Maximilian* is to accompany him to *Rome* to receive the laſt Right of the Imperial Dignity, and having given him the Inveſtiture of *Milan in feodo mere Imperiali*, then in poſſeſſion of the *French*, and in enmity with the Houſe of *Auſtria*: all things being thus concluded, and *H.* 8. having paid the Monies agreed on, and made ready his preparations, *Charles* the Fifth and Grandſon of *Maximilian*, is a rub in this League, who muſt be firſt removed; thereupon the old Fox the Emperor ſends a Propoſal, that he would come firſt into the *Netherlands* to take off his Grandſon, which while agitating, he ſtrikes up a ſecret Peace with the *French* King, and ſo *H.* 8. is betrayed a third time and the agreement refuſed to be complied with, *Cotton Treaty of Amity fol.* 99.

VIII. Hence it is, that during Treaties, be they open or ſecret, the Princes or States concerned in them, muſt watch the more carefully, have the diligenter Eye, and by all the ways imaginable reinforce their ſtrength, not only to fruſtrate their Enemies of all hopes to ſurprize them, but to the end the Conſideration of their Force and Opulency may put them in a poſture to obtain Conditions of more Advantage. Beſides, it is an undeniable Maxim, that no treaty muſt be held firm, valid, and concluded, unleſs it be ratified by that Prince or State with whom the ſame is made, eſpecially if it be with a Prince whom they detain Priſoner; for by † Law the force by the which he hath been conſtrained to promiſe, will at leaſt diſpenſe with him ſo far as to re-adviſe, if not to break.

† *Sacramento quidem vos tenere qui potuit, quum projectis faſcibus & depoſito Imperio privatus & captus ipſe in alienam veniſſet poteſtatem?* Curio *in* Cæſar, to thoſe that had been the Soldiers of *Domitius*, ſo ſpake, *lib.* 11. *de Bello Civili. Vide Grot. lib.* 2. *cap.* 13. §. 18. Pope *Clement* the Seventh refuſed to ratifie the Treaty with Duke *Ferrara* which he made when a Priſoner, ſaying, That it was a diſhonorable thing for a Man in Life to ratifie a matter done in his Name when dead, not conſiſtent with his Honour nor Intereſt. So *Francis* the Firſt excuſed himſelf to ratifie the Treaty of *Madrid*, upon the inhumanity done to him by the permiſſion of *Charles* the Fifth, they being extorted from him, nor did they take place, though the King left his Children as Hoſtages.

IX. Again, as in the Parlies of Princes, the place where the Interview is to be made is very conſiderable; ſo is it in

in Treaties which are tranſacted by Embaſſadors, Agents, Envoys, *&c.* If it be to compleat a Peace, or ſettle a League, it muſt not be too far from the Confederates, but at ſome convenient place, to the end they may have the more ſpeedy Anſwers from their Principals; but then the firſt is always to be in ſome place Neuter, or ſometimes upon the Confines of Kingdoms; for that it is neither reaſonable or honourable to treat a Peace in the Territory of one's Enemy; but the latter touching Leagues may be any where. That of *Edward* the Fourth with *Lewis* the Eleventh was in the Territories of the Duke of *Burgundy*, but that was perſonal: And that between *France* and *Spain*, concluded by Cardinal *Mazarine* and *Dom Lewis Mendez de Haro*, Plenipotentiaries of both Crowns, was in the *November 7. 1659.* Iſle of *Pheaſants* in the River *Bidaſſoa* upon the Confines of the *Pirenæan* Mountains. And the laſt great Treaty which begun at *Cologne* in the year 1673. under the Mediation of *Swedeland*, in order to put an end to that War wherein moſt of the Crown'd Heads of *Europe* were involved, was lookt upon as a place proper; but the ſeizing of Prince *William* of *Furſtemberg*, and the taking of Forty thouſand Crowns out of the Waggons of the *French* Embaſſador in a Neutral City, broke off that Negotiation; and though the violence committed on this Prince, by the Emperor's Miniſters, and the injury done to the *French* King, gave ground to fear, that there was no Peace to be expected, and that the Moſt Chriſtian King would never conſent to the renewing of the Treaty, unleſs reparations were firſt made for thoſe two injuries. Nevertheleſs, at the inſtance of the King of *England* (whoſe Mediation was generally embraced by all the Princes concerned in that War) and at the ſolicitation of the Biſhop of *Strasburg*, who publickly declared he preferred the Advantages of Peace before the Liberty of his own Brother. *Nimmegen* was pitch'd upon as a place neuter and proper for a Treaty, and thereupon the *French* King, 17 *February*, 1675. named for that Effect the Duke of *Vitry*, Monſieur *Colbert*, and the Count *D'Avaux*, his Embaſſadors.

X. *Embaſſadors* having received Orders to treat, the Prince, to whom ſuch are ſent, is not by the Law of Treaties bound to treat perſonally, but only to deput

ſon

ſome of his Council for that Effect; the reaſon is, for that the Dignity of a Prince may receive ſome detriment which cannot be maintained amidſt the Conteſtations which happen in Conferences.

But if an Ambaſſador be deputed as Lieutenant to a Prince, there indeed ſuch Commiſſioner is not bound to treat but only with the Prince himſelf: and ſo it was where the Biſhop of *Gurgia*, was deputed by the *Emperor* to Pope *Julius* the Second; the Pope commiſſionated three *Cardinals* to treat with him; but the Biſhop having notice in what quality he was like to be received, commiſſionated three Gentlemen to confer with them, excuſing himſelf upon other Affairs, which afterwards was explained, that he came not as a ſingle Embaſſador, but as a Lieutenant to the *Emperor*, in the which Quality he had been received at *Rome* by the *Pope*: yet it hath ſo happened, that Embaſſadors, if not admitted to a perſonal Treaty, have refuſed the Diſcharge of their Commiſſion, and ſo did Chancellor *Marvel*, Embaſſador from the *French* King, who delivered his Meſſage to *Philip* Duke of *Burgundy*, was interrupted by *Charles* the Duke's Son. *I am ſent* (ſaid he) *not to treat with you, but with your Father*; and Mr. *Wade*, who being commiſſionated by Queen *Elizabeth* to *Philip* King of *Spain*, would by no means admit himſelf to be turned over* to the *Spaniſh* Privy-Council, but would either have Audience from the King himſelf, or would return without it.

Julius Ferretus de Legatis Principum, & de eorum fide & officio.

There is commonly in the inſtructions provided for the Embaſſador in that point, if the matter ſhould come into debate.

Phil. Comines lib. 1.

* *Cambden Eliz. in An.* 1584. *fol.* 380.

XI. The *Deputies* being aſſembled, their Seats are Conſiderable, they having no power to quit any thing of the rank which their *Maſters* ought to hold: and by the Law of Treaties the firſt place is at the head or end of the *Table*, (if there be one) the ſecond is the firſt on the right hand, and the third is the firſt on the left hand of him that is at the end: and if there be many *Deputies* to one Prince, they uſually ſit at one ſide, to have the more facility to confer together, if it be needful.

XII. The Embaſſadors having concluded and ſettled their Places, their Commiſſions of each ſide are to be inſpected and conſidered: and therefore it is an undoubted Maxim, That when they are general or ambiguous, the Principals have no will to conclude; or if they are fair and plain, yet there may be wanting power to conclude,

So *Julius* the Second did, who finding himſelf preſt to make Peace with *Lewis* 12. ſent Cardinal of *Final*, and Bi-

ſhop of *Tivolly* to *Paris*, but never armed them with Power to conclude: this was to fruſtrate the important inſtance of the Conſiſtory.

or having power to conclude, it may be with a Salvo, till they are ratified.

The principal Clauſes generally are,
1. Either for Peace or Truce.
2. For Reſtitution of that which they pretend hath been unjuſtly taken away.
3. For the Ceſſion of Rights.
4. For Limits and Bounds, the which if they cannot regulate, they put them in ſuſpence, or elſe they make ſome Act which may interrupt the preſcription of him which holds them.
5. For paſſage, with Conſignation of Hoſtages.
6. For Forts or Caſtles for Aſſurances.
7. For an Offenſive and Defenſive League.
8. For Neutrality.

In the managing of all which, and of all other matters proper for ſuch Treaties a ſpecial regard muſt be had not to move for a Perſon odious to him with whom the Treaty is made, nor to yield to the firſt demands though never ſo juſt, but reſiſt them ſtoutly; but if danger is eminent, then it is a certain Maxim, *Not to ſtudy ſo much to Negotiate with advantage, as to provide for ſafety.*

The Leagues between the Crown of *France* and *Spain*, are commonly between Kings and Kings, Realm and Realm, and Man and Man of their Subjects, and have in time paſt been lookt upon to be the firmeſt of Al-

XIII. Treaties which are made with our Neighbours as Friends, are called *Treaties of Alliances, equal* or *unequal.* The *equal* is either of ſingle Friendſhip only, for the entertainment of Traffick, or for aid and ſuccour; that of ſuccour is for the *Defenſive* or *Offenſive*, and ſometimes for both, with or againſt all Men, or againſt ſome certain Princes and Republicks, and their Alliances are contracted, either from *Eſtate* to *Eſtate*, and for the Preſervation of the *Eſtates* of each other (in which caſe by the death of the Prince they may not be interrupted) Or elſe they are contracted betwixt *Prince* and *Prince*, and then the death of one ſuſpends till a new Treaty hath confirmed it, unleſs there is a time certain preſcribed by the *Treaty*, to the which the Alliance muſt continue after the death of the *Prince*; Or elſe they are made from an *Eſtate* to a *Prince*, where the death of the Prince does likewiſe, if not diſſolve, yet at leaſt ſuſpend till a new Treaty of Confirmation

tion of the precedents, although by the Laws of *England* *Rex non intermoritur.*

liances. *Phil. Comines lib.* 2. *cap.* 8. And in the very Alliance with *France* concluded *July* $\frac{2\,1}{3\,1}$. The firſt Article is in theſe words : *That there be an univerſal and perpetual, true, and ſincere Peace and Amity between the Moſt Chriſtian King and the King of* Great Britain, *their Heirs and Succeſſors, and between the Kingdoms, States, and Subjects of both,* &c *Vide* 9 *E.* 4. 2. *a.* The League then made with the *Scots*, and likewiſe between *Edward* the Fourth and the Duke of *Burgundy*. *Phil. Comin. l.* 3. *c.* 6.

XIV. Sometimes *Alliances* are contracted for an Enterprize and for one effect only, in the part in which the Allies are intereſſed, and ſuch are generally called *Leagues*, which in *England* have been ſometimes confirmed by *Act of Parliament* *.

* *Rot. Pat.* 4. *H* 5. *num.* 4. *Coke* 4. *Inſtit.* 156.

Leagues are ſuch Agreements that are made by the Command of the Supreme Power, and whereby the whole Nation is made liable to the Wrath of God, if they infringe it.

Grot. de jure belli & pacis l. 2. *c.* 15. §. 3.

All Leagues or Safeconducts are, or ought to be of Record, that is they ought to be inrolled in the Chancery, to the end the Subject may know, who are in Amity with the King, and who not, who are Enemies and can have no Action here, and who are in League and may have Actions Perſonal here, 4 *Inſt*. 152.

Leagues commonly are *Offenſive*, but in effect they tend to attempt againſt ſome one, and in the bottom are lodged *Articles of Secrecy for the Enterprize* : and ſuch was that of *Cambray* againſt the *Venetians*, in which they borrowed the *pretext of Religion and the Peace of Chriſtendom.*

Treaty of *Cambray*, the Confederates of which were Pope *Julius* the Second, the *Emperor*, Kings of *France*, *Spain*, and *Arragon*, *Anno* 1558. *Vide* Hiſtory of the Republick of *Venice fol.* 87.

XV. The ordinary cauſes for which *Princes* and *Republicks* make Leagues, are either to facilitate a Conqueſt, as that that was made between *Lewis* the Twelfth and *Ferdinand of Arragon*, for the Realm of *Naples*, or to balance the Forces of one that is more mighty, in hindering him that he grow not greater ; but Arms ought not to be taken to diminiſh ſuch a Neighbour's power, for that fear is uncertain; but prudent Leagues may be made for dimniſhing their power.

Sed ut vim pati poſſe ad vim inferendam jus tribuat, ab omni æquitate abhorret. Grotius de jure belli & pacis l. 2. *c.* 15. §. 17.

The *Engliſh* made a League to ſuccour the *Hollanders*, not only to balance the growing opulency of the *Spaniſh* Monarcy, but likewiſe to encreaſe her own by the Alliance of the *Dutch*. *Quid ſequitur?*

XVI. Again, Leagues may be made for the procuring of a general peace by way of *Mediation* of their Neighbours in War, and ſuch was the late Treaty of *Nimmegen* mediated by the King of *England*, and concluded *Aug.* 10. 1678. between the Ambaſſadors and Plenipotentiaries of his moſt Chriſtian Majeſty on the one part, and the Ambaſſadors and Plenipotentiaries of the Lords *States General* of the *United Provinces* on the other part; ſuch was alſo the League of Union propounded by His late Sacred Majeſty, and afterwards concluded betwixt him and the *States General* of the *United Provinces* for an efficacious Mediation of Peace between *France* and *Spain*, His Sacred Majeſty of *Britain* having a Proſpect to what afterwards happened, and of a War, wherein moſt inevitably would be involved moſt of the Princes in *Chriſtendom*; to the effecting of which Peace, His Majeſty and the *States General* did obtain a promiſe from the *French* King to the *Dutch*, to lay down Arms, on condition the *Spaniards* would formally and ſolemnly, by a Treaty of Peace, quit to him all thoſe Places and Forts, together with the *Chaſtellenies* and their appurtenances, which they by force of Arms had taken in, or fortified in the then laſt year's Expedition; or, otherwiſe that the *Spaniard* be brought to transfer to the *French* all their remainder in the Dutchy of *Luxemburg* (or to the County of *Burgundy*) together with *Cambray* and *Cambreſis*, *Douay*, *Ayre*, St. *Omers*, *Bergue*, St. *Avinox*, *Fuernes*, and *Lynk*, with the Bailiwicks, *Chaſtellenies* and all other their dependencies; and the *French* King to reſtore to the *Spaniard* all Places, Territories, which they have by Arms taken ſince their entrance into *Flanders*, on Condition that the *States General* do reciprocally undertake and ſecure to the *French*, to prevail with the *Spaniard* to conſent to the ſame Conditions, which once effected would (as was hoped) initiate the tranquillity and be the intereſt not only of the two Warring Crowns, but of all other the Princes of *Chriſtendom*. To the effecting of which there were ſeveral Articles agreed; and likewiſe it was agreed, that if a Peace ſhould happen to be made; His

League of Union between his Majeſty of *Great Britain* and the *States General* of the United *Netherlands*, concluded at the *Hague*, *Jan* $\frac{13}{23}$ *Ann* 1668.

His Majeſty and the *States General* ſhould become Warrantees, and a place left for any other Prince or State to come into the ſame, who ſhould think it their Intereſt to keep the Peace of *Chriſtendom* undiſturbed, and to reſtore the *Low-Countries* to their tranquillity: there was proviſion made likewiſe by the ſame, for the Forces of each of the Warrantees to be uſed againſt thoſe that ſhould break and violate the ſame, obliging them to ceaſe the violence, and repair the Party injured.

XVII. A *Defenſive League*, which hath no other benefit but a neceſſary defence, and in the which mean Eſtates are in a manner equally intereſſed, laſt uſually longer than an *Offenſive League*, which is voluntary, and from the which either of the *Confederates* will eaſily part when he hath more intereſt: So as in *balancing* the intereſt of the one and the other, he that ſhall find himſelf accompanied with diſtruſt, and an opinion to be irreconcilable to the common Enemy, generally proves the moſt firm in the League.

But a Defenſive War is unjuſt on his part who gave juſt cauſe of War. The Anſwer of the Ambaſſador from *Privernum* to the Senate: *Si bonam dederitis & fidam & perpetuam; ſi malam haud diuturnam*, *Liv. lib.* 8. 21.

The *Wiſdom*, *Courage*, *Means*, and *Conſtancy* of the Prince or State is to be conſidered; ſo likewiſe the *diſtance* of the *Places*, as well in regard of thoſe with whom they unite, as of thoſe againſt whom they make the Leagues.

XVIII. *Leagues* having no other limitation, *but the end of the Enterpriſe* for which they are made, have admitted many large debates in caſes of accident: For inſtance, If an Enemy ſhall take the Country, for the defence whereof the League was made, the Queſtion has been whether the *Confederates* be bound to aſſiſt him who hath loſt it, in the Recovery; ſome have held, that the *Defenſive* did not extend ſo far: notwithſtanding if there were no Treaty, which had concerned this Conqueſt, yet it would ſeem more reaſonable to comprehend the Recovery in the defenſive, if it be general. For as its end is to preſerve the *Allie in his State*, and to attain it, the Forces muſt not only remain in the Country of the *Allie* to attend the Enemy; but after denunciation and other acts of Hoſtility done by the Enemy, they muſt enter into his Country, to the end to prevent him or divert him

Pontius Samnis after reſtitution made to the *Romans*, and the Author of the breach yielded up, *expiatum* (ſaith he) *eſt quicquid ex fœdere rupto irarum in nos cæleſtium fuit. Satis ſcio quibuſcunque Diis cordi fuit ſubigi nos ad neceſſitatem cedendi res, iis non fuiſſe cordi*

tam ſuperbè à Romanis fœderis expiationem ſpretam: And a little after, What more do I owe to thee, O *Roman*? what to the League? what to the Gods, the Judges of the League? whom ſhall I bring unto thee to be the Judge of thy anger and of my puniſhment? I refuſe no People, nor private Men.

him from attempting any thing againſt the *Allie*, the *Offenſive* being judged by the *aggreſſion*, and not by *that which follows*; by a ſtronger reaſon they ought to enter into the Country conquered from the *Allie*, for the recovery thereof; but excuſes in this kind proceed from thoſe who fail in their faith, courage, or means to recover.

An. 1515. *Vid.* Sir *Robert Cotton Remonſt.* of the Treaties of Amity and Marriage.

XIX. *Contribution* is one of the main ingredients in a *League*, and is of great difficulty to regulate. It is made either in *Men* or *Money*; the Men are entertained *by all Parties*, or *by him only that hath need*, or otherwiſe as the League is. *Henry* the Eighth made a League with *Francis* the *French* King againſt the Emperor *Maximilian* and *Ferdinand*, for the Recovery of *Milan*, which he did, for the protection of his Neighbour, and Reduction of the *Swiſſe* from the *Imperial* ſide, for which he employed the *Baſtard of Savoy*; the agreement was of reciprocal Succour of 10000 Men, if the War were by Land, and of 6000 if it were made by Sea; and in all other occaſions, the *French* King was bound to aſſiſt the King of *England* with 12000 *Lances*, and he the King of *France* with 10000 Foot at his charge that had need.

So where *Contribution* is concluded for Money, there are difficulties that do ariſe from the *Perſon* or *Place* where it muſt be kept; to deliver it into the hand of the ſtrongeſt, is not ſafe, *for fear they ſhall not be able to call him to account*; to lay it in a weak place, were to expoſe it *to the attempt and force of the ſtrongeſt*, or to him that ſhall firſt *take Arms*; but it has been uſual for the ſum not to be advanced till after the War begun.

Andrea Maurroceni Hiſt. Ven.

XX. Leagues concluded by the *Deputies* of the *Confederates*, there ſometimes falls out a difficulty who ſhall ratifie and declare himſelf firſt. In the League which was made between *Francis* the Firſt, the *Pope*, and the *Princes* of *Italy*, the King refuſed to ratifie until the *Pope* and *Venetians* had ratified before him, and in that he ſo cunningly wrought, that he procured the *Collegues* to declare and

and begin the War, whilſt that he treated ſecretly for himſelf, to the end he might make his Conditions with more advantage; this he declared was for fear thoſe *Italian Foxes ſhould ſhew him the like.*

XXI. *Leagues* made for an Enterpriſe ſucceed ſeldom according to the hope of the *Allies, if the Enterpriſe be long*; for beſides that the preparations be long, the opinions divers in the purſuit, the reſolutions inconſtant, the intereſts of Princes or States in a League may change with time, or with the practice of him againſt whom they are in League, in withdrawing ſome one of them, or making him to ſuffer more loſs than the reſt; for ſeeing himſelf *ill defended or ſuccoured* by his *Confederate*, and that he was in a greater danger to loſe than his Companions, he then ſtudies to retire * and to make his *accord apart*, as did the *Venetians* with the *Turks*, after the loſs of *Cyprus*.

* If one part hath violated the League, the other may depart from it; for the ſeveral Heads of the League have every one the force of a Condition, ſo *Grotius* conceives *l.* 2. *c.* 13. §. 15.

XXII. The ordinary cauſes of the Rupture of *Leagues* are *diſtruſt* and *jealouſie*, as if one hath had conference with the Enemy, without the conſent of the reſt; if that which ſerveth for the *ſafety of one*, diminiſh the *ſafety of the other*, *inconſtancy*, *variety*, *cowardice*, *diviſion*, *uſurpation* without the conſent of the others.

Soluti fœderis culpam ſuſtinent, non qui deſerti ad alios ſe conferunt, ſed qui quam jurati promiſerant opem re non præſtant. Alibi apud eundem, ſi vel tantillum ex dictis pars alterutra transgrederetur, rupta fore pacta. Thucyd. lib. 1.

So if he treats with the Enemy, not comprehending the other *Allies*, but as *Adherents*; as *Lewis* the Twelfth left the League of the *Venetians*, for that they had made a Truce with him, and had preſumed to name him only as an *Adherent*. It was the opinion of *Byran*, that if all the Subjects of *England* would make War with a *Confederate Prince* or *Republick* in League with the King of *England*, without the aſſent of the King of *England*, ſuch a War was no breach of the League; and upon the ſame reaſon were the reſolutions of the Judges in the Duke of *Norfolk*'s Caſe, where the Queſtion was, Whether the Lord *Heriſe* and other Subjects of the King of *Scots*, that without his aſſent had waſted and burnt divers Towns in *England*, and proclaimed Enemies, were Enemies in Law, within the *Statute* of 25 *E.* 3. the League being between the *Engliſh* and *Scots*, and reſolved they were, and that the League remained.

19 *E.* 4. *Vide Stat.* 2 *H.* 5. *c.* 6. *Hill.* 14. *Eliz.* in the Duke of *Norfolk*'s Caſe. 4 *Inſt. fol.* 152.

XXIII. The

XXIII. The Succours that one *Confederate* muſt afford another *Confederate* (according to the *Law of Leagues*) againſt a *Confederate*, is of great Conſequence: Three Princes Allied, the one makes War againſt the other, and demands ſuccours from the third; in this caſe if the Treaties of Alliance be only for *Friendſhip*, it is certain he is not bound to give any ſuccours: But if the Treaty carries an *Offenſive League*, he muſt ſuccour the moſt *ancient allied by a precedent Alliance*. If the precedent Alliances have been made both at one time, he muſt ſuccour him that is allied in an *Offenſive* and *Defenſive League*: but if the League be *Offenſive* and *Defenſive* of either ſide, *he ought not to ſuccour either*; but he may mediate a * Peace, and cauſe the difference to be judged by the *Common Allies*, which being propounded with a Declaration, that if one refuſe, or having once ſubmitted, will not yield to Judgment, he will ſuccour the other, as the *Swede* and *Swiſs*, upon ſeveral occaſions have done; notwithſtanding in point of State on ſuch occaſions they uſually balance their Eſtate, and looking *more to ſafety than Juſtice*, they ſuccour him who being enforc'd, may weaken the powerful, who is more to be feared; yet to unjuſt Wars there is no obligation; then certainly he ought to be preferred, who hath a juſt cauſe of War.

In fidelitate feudali dicitur; Et ſi ſcivero velle te aliquem juſte offendere, & generaliter vel ſpecialiter fuero requiſitus, meum tibi, ſicut potero, præſtabo auxilium. Orat. *Demoſthen. de Magalopoli.*

* *Nihil intercedi, quo minus Samniti populo pacis bellique liberum arbitrium ſit* Liv. *l.* 8. *Grotius de Jure belli ac Pacis lib.* 2. *cap.* 15. §. 13. *Vide Monmouth* Hiſtory *of France fol.* 31.

XXIV. By the *Laws of Alliances* Princes may aid *particular and common Allies*, if they be wronged by one of the *Allies*.

But he which is not comprehended in the Treaty of Alliance, cannot be *defended* againſt him that is *allied* without breach of the *Alliance*; therefore *Mediation* in ſuch caſes is the only hopes of the *oppreſſed*, which not having its effect, if the *oppreſſed* put themſelves into the protection of the *Mediator*, they then become in the nature of his Subjects, and then that *Prince* is obliged to their *ſuccour* and *defence*, even againſt his *Allies*, and this is by natural Right.

Equals cannot directly refuſe War, nor demand Peace.

Liv. 3. *Polybius in excerptis Legationum* 35.

XXV. By the Laws of Leagues, though the Oath binds only the *Perſon*, yet the *Promiſe binds the Succeſſor*; for though ſome do hold, that Leagues do depend upon the Oath as their Firmament, though that is not ſo for the moſt part, yet the *efficacy* of ſuch Leagues reſts in the *promiſe*

When *Edward* the Fourth was chaſed out of the Kingdom, and *Henry* the Sixth was ſet

promiſe it ſelf, to which for *Religion* ſake the Oath is added. Hence it is, that *Promiſes* made to a *Free people* are in their nature *real*, becauſe the Subject is a *permanent matter*; although the State or Republick be changed into a *Monarchy*, yet the League remains, for that the body, *i. e.* the *power* is ſtill the ſame, though the Head be changed. And the Perſon is inſerted into the agreement, not that the agreement may be perſonal, but to ſhew *with whom it is made*; for if it be inſerted into the League that it ſhall be *perpetual*, or that it is made for the *good of the Kingdom*, or with the Perſon and his Succeſſors, or for a time limited, the ſame does moſt apparently demonſtrate the thing to be real.

up again; yet by Reaſon there was inſerted into the ſame theſe words, *With the King and Realm*, that the League did remain perpetual. *Phil. Comines. lib. 3. cap. 6. Ulpian. Leg. Jure Gentium, ſect. pactum. D. pactis. Adde quæ Helvetiis cauſantur poſt mortem Hen. 3: apud Thuanum, lib. 97. in An. 1589. Vide & inſignem locum apud Cambden. in Anno 1572. ubi de Fœdere antiquo Gall. & Scot.*

However, in all Leagues which tend to *Peace*, though there may remain ſomewhat, whereby words of ambiguity may ariſe; yet the moſt pious way of interpreting, hath been to account the ſame rather *real*, than *perſonal*; for all Leagues made for Peace or Commerce, admit of a favourable conſtruction, *Leagues defenſive have more of favour, offenſive of burthen.*

XXVI. Leagues made with *Princes*, although they happen afterwards to be driven out of their Kingdoms by their Subjects, yet the League remains firm and good; for the *Right* of the Kingdom remains with ſuch an unfortunate Prince, notwithſtanding he hath loſt his Kingdom: The Preſident, Canon, and Plenipotentiary for the Duke of *Lorraine* at the Treaty of *Nimmegen*, renewed his inſtances with the *French* Ambaſſadors, that he might obtain ſome moderation of the Conditions that had been ſtipulated for his Maſter; the Emperor did the like, but without ſucceſs; however the Duke would not neglect any thing that might give the *French* King freſh Evidences of his deſire to merit the Favour of his Majeſty, he got Sir *Leoline Jenkins*, and the reſt of the Mediators, to declare to Monſieur *Colbert*, that the Emperor had taken into his Service all the *Lorraine* Forces; and in the publick Declaration which the Duke made at *Nimmegen*, he ſaid,

Quintus ſaid to *Nabis*, We have made no Friendſhip nor Society with thee, but with *Pelops* the juſt and lawful King of the *Lacedæmonians*.

ſaid, *That he had delivered all his Forces to a Prince at Peace with* France, *that he might make it appear to the King, that though he was expelled his own Dominion, yet he would do nothing that might give his Majeſty ground to deprive him of the honour of his favour:* And notwithſtanding all theſe moſt ſubmiſſive offers, this Unfortunate but Gallant Prince was ſhut out of that famous Treaty, which put an end to a War wherein almoſt all the Princes of *Europe* were engaged. On the other hand, Leagues made with the *Invader* cannot be good; for his cauſe being *unjuſt, is odious*: but if * the People will make him King *de facto*, and inveſt him, the queſtion is then out of all controverſie; for then he is become a King *regnant*, and by the Laws of *England*, if Treaſon be committed againſt his Perſon, and † after he is beaten out, and the King *de Jure* comes to his Crown, the King *de Jure* may puniſh thoſe Traytors with death.

* 11 *H.* 7. *c.* 1.

† 4 *E.* 4. 1. 9 *E.* 4. 12. 3. *Inſt. fol.* 7.

The Earl of *Warwick* having raiſed an Army in *France* and *Flanders*, invaded *England*, and within five or ſix days after his landing, King *Edward's* Forces betraying him, the Earl became Maſter of the Realm; the King flying for protection to his Kinſman the Duke of *Burgundy*, he kindly in his misfortunes entertained him; yet while he was in this baniſhed eſtate, the Duke of *Burgundy* renewed the League with the *Engliſh*, it being agreed, that notwithſtanding King *Edward's* misfortune, the League remained firm and inviolable between the Duke *Charles of Burgundy*, and the King and Realm of *England*: So that for *Edward* they ſhould name *Henry* (who was newly taken out of the *Tower* by the Earl of *Warwick*, at his chaſing out of King *Edward*.) Now the true reaſon that Leagues remain, and are firm, notwithſtanding ſuch a change, is, becauſe there goes along with them a tacit condition, *viz.* of holding their poſſeſſions; and therefore the World wondred not, that His late Sacred *Majeſty* having ſworn a League with the King of *Spain*, expreſly as he was King of *Portugal*, did notwithſtanding receive two *Ambaſſadours* from the then new King of *Portugal*; and that without being judged either in *England* or *Spain* to have broken his former Oath and League.

Ed. 4. *in An.* 1470.

Phil. Comines l. 3. *c.* 6.

Reges qui regnis exuti ſunt cum aliis regni bonis etiam jus legandi perdiderunt.

The

The Duke of *Guiſe* having formed the League againſt *Henry* the Third, which was, in regard the King was ſo cold in the Profeſſion of the *Romiſh Faith*, that it was in danger to be extinguiſht by the increaſe which he permitted of the *Reformed* Religion, eſpecially ſeeing *Henry* the fourth then King of *Navarre*, was of that Religion, and was to ſucceed to the Crown; wherefore by the Mediation of *Philip* the Second of *Spain*, the *Pope* qualified the Duke of *Guiſe*, Head of that *Catholick League*, and (which in point of Government was to ſet him above the King) avowed him *Protector* of the *Catholick Faith* in the Kingdom of *France*. When *Henry* the Fourth ſucceeded to the Crown, then this League for ſecurity of Religion was moſt violent, and the *Spaniards* without, hoped, by nouriſhing thus the *diviſion* within, to carry all for himſelf at laſt. To avoid which gin, and to anſwer all, the King changed his Religion, and negotiated by *d'Oſſat*, to be received by the *Pope* as a dutiful Son of the *Church of Rome*, demanding abſolution for what was paſt, and making large promiſes of due obedience for the time to come. The King of *Spain*'s intereſt was, that he ſhould not be received, and thereupon he endeavoured to perſuade the *Pope*, that King *Henry* did but diſſemble with him, and that under this Diſguiſe he would eaſilieſt ruine the *Romiſh* Religion: Notwithſtanding this the Cardinal obtained his Reception, Abſolution, and Benediction, through the many Promiſes and Preſents which he made to *His Holineſs*; whereupon the *Spaniard*'s Deſigns were in a Moment all blown over from *France*, but fell heavily upon the *United Provinces*, which were ſorely oppreſt, for that they apprehended the Loſs and Ruine of their Country; and thereupon they implored Aſſiſtance from King *Henry*, who received their Ambaſſadors very Graciouſly, and gave them Aſſurance of Relief. The King of *Spain*, who wanted no good Intelligence in the Court of *France*, immediately remonſtrated to the *Pope*, That his former Intimations concerning *Henry*'s Diſſimulations, did now appear in the Face of all the World; and that ſeeing *His Holineſs* had been ſo Credulous, he knew not now whether they ſhould be able to ſave the *Catholick Faith* from being ſubjected to the *Reformed* Religion or no: for whereas the *Hollanders* had revolted from him, only becauſe he reſolved to uſe the true

Peter Mathews Hiſtory of *France* in the Life of *Henry* III.

true Means for the Eſtabliſhment of the *Romiſh Faith* among them; and that now he was in a fair way of reducing them (which conduced ſo much (by *His Holineſs* his Opinion) to the Eſtabliſhment of the *Romiſh Faith*) *Henry* had taken their Party againſt him in that Work; and that at *Paris* he had received their Ambaſſadours to that Purpoſe, although he knew they were his lawful Subjects, *&c.*

This ſtartled the *Pope* not a little, who charged *d'Oſſat* for having betrayed him, and put the Church in Danger. This Argument was as ſubtil on the *Spaniards* ſide, as changing Religion was on King *Henry*'s; and therefore the *Cardinal* was not a little perplext how to anſwer it to the Advantage of his Maſter; as alſo coherently to the Conſiderations of his former Reception into the Church: But at laſt he replied, That *His Holineſs* needed not wonder how in reaſon of State, thoſe different Religions might joyn together for political Ends, without Hazard of altering Religion. Thus *David* ſought Protection of the *Philiſtines*, and *Abraham* redeemed the ſinful *Sodomites*. That he took it to be upon the ſame Ground; that *His Holineſs* himſelf, not long before, received a *Perſian Ambaſſador*, who was ſo far from being an Heretick, that he never pretended to the Name of Chriſtian: That it was a plauſible Argument which the King of *Spain* uſed, in complaining of *Henry*'s receiving and avowing their Ambaſſador, eſpecially knowing at the ſame time that they were Rebels, and could pretend no Right or Title ſeparate from his Crown: 'For Princes (quoth he) when Ambaſſadors 'are addreſt to them, never inform themſelves of the 'Rights and Title of thoſe Princes from whom they are 'ſent; but whether they have Poſſeſſion of the Force and 'Power of thoſe Places from whence the Ambaſſadors are 'employed; for it would be an endleſs Task, and re'quire an infallible true Hiſtory of the World (which is 'not to be made by Man) if all the Ambaſſadors, be'fore their Reception, ſhould be obliged, firſt to prove 'clearly to the World, the juſt Right by which their 'Maſters derive thoſe Titles and Juriſdictions which 'they aſſume to themſelves.

Vide Peter Matthew's Hiſtory of *France in Vitâ Hen.* 4. *In Regno diviſo gens una, pro tempore quaſi duæ gentes habentur*: And Princes are to have an Eye to the Power which each Kingdom hath to afford Benefit one to the other, and not to examine their Titles.

XXVII. And as Leagues are Covenants or Agreements made by Command of the higheſt Powers, wherein the

Parties

Parties are bound over to the Divine Wrath, in caſe they break their Faith; it hath been a famous queſtion, Whether they may be entred into with thoſe that are Aliens from the true Religion, whereof by the Law of Nature there is no doubt nor difficulty; for that Law is ſo common to all Men, that it admits not any difference of Religion; but the queſtion is about the Law Divine, out of which it hath been diſcuſſed, not only by Divines, but famous Laywers, as *Oldradus*, *Decianus*, *Grotius*; upon the whole they have agreed, that they may be entred into as well with Princes Idfidels as Chriſtians: and that is evidently proved; for that before the Law of *Moſes* it was lawful to contract Leagues with Aliens from Religion for an inoffenſive and harmleſs behaviour, as that of *Jacob* with *Laban*: nor did the Law of *Moſes* make any change, the example of the *Egyptians* being expreſs in the point. 'Tis true thoſe ſeven Nations and other Kingdoms, as the *Amalekites*, that were deſtinated by Divine Sentence to be extirpated, were excepted; but Leagues of Commerce, and ſuch as pertain to the utility of both Nations, or of either Party, are by the Law permitted with the profane: So *David* and *Solomon* made League with *Hiram* King of the *Tyrians*; and that which is very obſervable in the Sacred Hiſtory, of that Action it is ſaid, That the Alliance was made by *Solomon* according to the Wiſdom which God had given him. 'Tis very true, the *Jews* were generally very cautious of contracting with Idolatrous Princes, and the Reaſon was, for that they had expreſs Promiſes of Victory, but that was conditionally, *i. e.* if they kept the Law, which if perform'd, they had the leſs need of human Aid. But now under the Goſpel ſuch Contracts have a more favourable Admittance, according to that of *Tertullian*: *So long as* Iſrael *only was his people, God did juſtly command mercy towards their Brethren alone; but after that he gave unto Chriſt the Nations for his Inheritance, and the Ends of the Earth for his poſſeſſion; and that began to be paid which was promiſed in* Hoſea, *They that werere not my people ſhall be my people, and the Nations that had not obtain'd mercy ſhall obtain mercy; from that time Chriſt hath extended unto all the Law of Fraternal Benignity, excluding none from our compaſſion no more than from his Vocation*; and therefore as it is no evil to do good to the prophane, ſo neither is it

[Margin notes: *Coke* 3. *Inſtit. fol.* 155. — *Grot. Lib.* 2. *cap.* 15. §. 8, 9, 10. — *Lib.* 7. *cap.* 3. — *Horum exemplum ſecuti Imperatores & Reges Chriſtiani Fœdera, aut cum non Chriſtianis, aut cum non ſanè Chriſtianis fecere, Conſtantius cum*]

unlawful to implore their help, as *Paul* invoked the Aid of *Cæſar* and the Chief Captain; ſo that at this day there is no intrinſecal or univerſal Pravity; nevertheleſs thoſe Alliances have their Circumſtances or Rules of Government, as not to joyn with them but in extreme neceſſity, according to that of * *Thucydides: They that are treacherouſly aſſaulted, as we are by the* Athenians, *are not to be blamed, if they ſeek for ſafety, and ſecure themſelves by the aid not of* Greeks *only, but* Barbarians.

Gothis & Vandalis, Juſtinianus cum Longobardis, cum Saracenis Theodoſius, Honorius. & cum Mauris Reges Hiſpaniæ, cum Tartaris Rodolphus Habſpurgenſis, Adi Johannem de Carthagena l. 3. *de Jure Belli Romani Pontificis c.* 1. *Julius ſecundus Pontifex Turcis uſus, Vide Bulſtrod. part.* 3. *fol.* 28. cited in *Marſhe*'s Caſe, the Caſe of *Samuel Pellagy* that had been Ambaſſador to the *States of* Holland to treat with them from the Emperor of *Morocco*.

* Famous was the Piety of *Emanuel* Duke of *Savoy*, who when he was able to take *Cyprus* by the aid of the Great *Truk*, refuſed it.

CHAP.

Chap. VIII.

Of Alliances unequal, and of Protection. *

I. Of *Alliances unequal, in reference to the acknowledging a Superiority or Protection in another.*
II. Of *Protections by a Prince or State voluntary or mercenary.*
III. Of *the Conveniences of ſuch Alliances, how conſidered.*
IV. Of *the Duty incumbent on the protected, and the obligation in honour and Juſtice on the Protector.*
V. Of *Alliances unequal, and of the ordinary Cauſes that may tend to a Rupture of the ſame.*
VI. Of *the Cauſes extraordinary that may occaſion the Breach of ſuch Alliances.*
VII. Of *Faith and Aſſurance implicitly diſcharged by the delivering of Hoſtages.*
VIII. Of *the differences of Leagues contracted by Princes, through force or fear, differing from* Contracts *private.*
IX. Of *Ambiguity in words, how it hath given occaſion to Princes to depart from the League, and of the Reputation of Princes on ſuch occaſion preſerving the Alliance.*
X. Of *the firmneſs and aſſurance of Alliances, whether to be found more in* Princes, *or in* Republicks.
XI. *If one Party hath violated the League, whether it be lawful for the other to depart from the ſame.*
XII. *In the conſtruction of Leagues, the Thoughts not the Words of Princes to be conſidered.*
XIII. Of *things tacitly excepted in all Leagues and Treaties, in reference to their nullity.*
XIV. Of *things favourable, things odious, and others of a mixt nature to be uſed in the interpreting of Leagues.*

I. UNequal Alliance is that which is contracted betwixt Princes or States *unequal* in *Honour*, or in *Power*, with unequal Conditions, the acknowledging the other, *not for Maſter or Lord*, but by Honour as the more powerful, and the better qualified, and ſome for *Protector*; and theſe Treaties are made with thoſe States, which take or give *Penſion*, or which put themſelves into *Protection*. And ſuch was the League of * Protection propounded to Queen *Elizabeth* by the *States General* of the *United Provinces*, who by *Joos Van Menin* moſt humbly beſought Her to accept of the Sovereignty and Supream Dominion over the ſaid *United Provinces* upon certain and reaſonable Conditions and Articles, *&c.*

Andronicus Rhodius poſt Ariſtotelem, amicitiæ inter partes, hoc ait proprium, ut potentiori plus honoris, infirmiori plus auxilii deferatur. in Grot. lib. 1. *c.* 2. §. 21. *n.* 2. It is the property of Friendſhip 'twixt unequals, that the

ſtronger have more Honour, and the weaker have mere Help: *Proculus* adds that ſuch a Clauſe is inſerted in the League, to ſignifie the one is ſuperior in Authority and Dignity, for both are free, but are *ſub patrocinio, non ſub ditione. Liv. lib.* 37. *Cicero Offic.* 2.

* *Non ſine metu in poſterum, quem tunc præſens neceſſitas averterat. Grotius Annal. lib.* 5. *A. E. Miteran. lib.* 13. *ad An.* 1585. *Grimſton, lib.* 12. *ad An.* 1585.

Tribute is paid by the *Subject*, or by him, who, to enjoy his liberty, pays that which is agreed upon to him that hath forc'd him to do it. But a *Penſion* is held voluntary from him that is in *Protection*, or from him that is in all other things *equal* to the *Treaty* of *Alliance* to hinder the *Penſioners*, that he joyn not with the Enemy, as the *Swiſs* to the *French*, or to have Aid and Succours from him.

Leg. non dubit D. de Cap. II. But that *Protection* is moſt true and Honourable, when a Prince or *Republick* takes upon him the defence of another, *freely without Reward*, though ſome, if not all, find it moſt neceſſary to ballance Honour with Profit, from this Maxim, that *A pecuniary intereſt obliges more to ſuccour, than when barely obliged by Oath.*

III. Again there ſeems to be a kind of *Protection* or an Alliance, which indeed is no more than a bare pecuniary retaining. Politicians have conſidered the Subject diverſly, either Abſolute or Conditional; Abſolute is that which is meaſured by the concurrence of the greatneſs of Forces, Treaſure, Munitions, and other Military Preparations: Conditional is that, the which although it be leſs than an abſolute, yet is more fit to ſuccour us or do us Harm: in this the Neighbourhood is of very great conſideration; for that a Neighbour Prince of mean Forces may more eaſily hurt or ſuccour us, than a great Prince that lies far off; near Succours are always ſooner ready and with leſs Charge. And this makes the Biſhop of *Munſter* to be in that eſteem with the *States of Holland* and the other Sovereign Princes bordering on his Territory; and the Reaſon why he is ſo much the more courted into Aſſiſtance and Friendſhip is, for that his Forces being at hand, if Peace be concluded, he is the more eaſily diſpatched, whereas remote and abſolute Princes their ſuccours come often too late after the Occaſions to defend us, and too ſoon to oppreſs us.

IV. By

IV. By the Law of *Protection*, he that is protected owes all *Reſpect* and *Honour* to his *Protector*, againſt whom if he conſpire or attempt, or ſtrays from his duty, it is lawful for the Protector to make *better aſſurance*; nay, if he pleaſes, to make himſelf *Maſter*: But then on the other ſide, the Protector ought to defend and ſuccour the protected, and uſe him well; for otherwiſe he may withdraw himſelf from the Protection, and ſeek another.

The *Genoeſes* having put themſelves in the protection of the *French* King, revolted; he thereupon changed their Conditions into Priviledges, to the end it might be his Will to deprive them when he ſhould think fit. *Vide Cardinal. Thuſc. P. P. Concl.* 935.

V. In Alliances that are unequal, there are four kinds of Controverſies may happen.

Firſt, If the Subjects of a Prince or Republick, that is under the Protection of another have committed any thing *againſt the League*.

Secondly, if the Prince or Republick be accuſed.

Thirdly, If the Fellows, which are under the protection of the ſame *Prince* or *Republick*, contend with one another.

Fourthly, If the Subjects complain of their own Ruler.

This holds as well between Leagues equal as unequal. *Grotius de Jure Belli ac Pacis l.* 1. *c.* 3. §. 21.

This hath the ſame Right in Leagues that are equal: *Nam ut quis ultionem ſumat ab eo qui peccavit, ſatis eſt ut ipſe ei qui peccavit ſubditus non ſit. Grot. de Jure Belli, l.* 1. *c.* 3. § 21. *n.* 5.

To the firſt, if a Fault appears, the Prince or Republick is bound either to puniſh the Offender, or to render him unto the Party injured, and ſee or endeavour that Damages may be recovered.

But one of the *Aſſociates* in the League hath no Right to apprehend or puniſh the Subjects of his Confederate.

To the ſecond, the *Confederate* hath a Right to compel his Confederate to ſtand to the League, and if he will not, to puniſh him, for that one may take ſatisfaction or revenge of him that hath offended; and this happens as well amongſt thoſe that have no Confederation at all.

But that proves not any power of commanding, for Princes do uſually try their cauſes before Judges of their own chuſing *Ead. l.* 1. *c.* 3. 8. *n.* 6. *Docet.*

To the Third, as in Confederacies equal, the Controverſies are wont generally to be brought before an *Aſſembly* of the Confederates, that is to ſay, ſuch as are *not concerned* in the Queſtion, or elſe before *Arbitrators*, or elſe before the *Prince* of the *Aſſociation*, as a Common Arbitrator,

Eos qui Fœderis Principes ſunt, circa ſuas quidem utilitates nihil præcipuum ſumere; at in communibus rebus curandis eminere ſupra cæteros In Orat. Corinthiorum.

So on the other hand in a *League unequal*, it is agreed for the moſt part, that the Controverſies be debated before him who is *Superiour in the League*.

To the laſt, the *Confederates* have no *Cognizance*. In common Affairs out of time of Aſſembly, even where the *League* is equal, the Cuſtom is for him who is choſe *Chief of the League*, to have Command over the Confederates, according to the Speech of the *Corinthians* in *Thucydides*, *It becomes them that are Princes of the League, not to ſeek their own particular advantage, but to content themſelves with an Eminency above the reſt, in taking care of the common Intereſt*.

VI. Though that the Breach of Faith be much practiſed in ſuch Affairs, yet there are few Princes found, which have not found a *pretext*: ſome have pretended to be circumvented by error; others by Change of Affairs have pleaded an excuſe, as great Wrongs or inevitable Loſs, and apparent danger of the ruin of their *States*, which are the cauſes, wherein ſome ſay, that *an Oath is not obligatory*; the Condition, by reaſon of the Oath, being impoſſible or unjuſt; to theſe Limitations, ſome hold they muſt not keep faith with an *Enemy of the Faith*, nor with him that hath broken his, nor with a Subject, nor with a *Thief* or *Pirate*; certainly if it be not lawful for a Man in theſe caſes to keep *Faith*, it is not lawful to give it: If it be lawful to capitulate with ſuch Men, it is neceſſary to hold what we promiſe, that is, (we preſume) when the word is given by him that may give it, and that they rely upon it.

Oldrad Conſ. 1.

Gregorius, *Perjurium Deo culpam impingit negligentia.*

VII. If *Hoſtages* are taken, he that gives them is *freed from his Faith*; for that in receiving *Hoſtages*, he that receives them hath relinquiſhed from the aſſurance which he hath in the Faith of him that gave them; ſo where a *Captain* for his *Prince* gives his Word without *Commiſſion* it binds not the *Prince*.

VIII. Some Lawyers would judge of *Treaties* as particular *Contracts*, by which means they would ſtretch the Conſciences of *Princes*; for, ſay they, that as a private Man is not bound by that which he hath promiſed by *force* or *fear*, ſo it ought to take place amongſt *Princes* and in Treaties which are made betwixt Soveraigns; but that is ridiculous, for that were in effect to baniſh *Faith* from all publick

publick Negotiations; for there is no Treaty but what is uſually made in *Arms* by *force*, or through *fear* to loſe either Life, or Goods, or Liberty, or the *State*; which are cauſes of *juſt fear*, and may ſhake the moſt conſtant.

IX. Some Princes deſirous to ſhew themſelves more *irreligious* in theſe Ruptures, have taken ſubject and occaſion upon the *Ambiguity* of ſome Clauſes in the *Treaty*, or upon *Equivocation*, as *Charles the Fifth did*; or elſe they ſeek other Occaſions, as attempting againſt thoſe whom their Allie is bound to defend, to the end that drawing him into the field, *he may lay the cauſe of the Rupture on him.*

Upon the words *Evuing* and *Euig*. to retain the *Landgrave of Heſſe.*

But Princes, who Reſpect ſuch Treaties with a pious Intention of preſerving them, always remain conſtant and firm; and though occaſion may offer it ſelf, by which they might get *advantage* by the Breach; yet when they remain durable, ſuch reſpect is afterwards had to their Word and Honour, that fewer and leſſer ſecurities will be demanded of them, than one *whoſe Faith is doubted.*

X. But Aſſurances in caſes of this Nature have been found more in *Republicks* than in *Princes*; for though Republicks have the ſame mind, and the ſame *intentions* as Princes, yet for that they move but ſlowly, it will cauſe them to ſtay longer in reſolving. Famous is that of the *Athenians*, when *Themiſtocles* in his Oration told them, That he could diſcover a Matter in which the *Athenians* would reap great Advantages, but he could not tell it, for fear the Diſcovery would take away the Opportunity of atchieving it: whereupon the *Athenians* deputed *Ariſtides*, to whom he ſhould communicate the Secret, and with him ſhould conſult about the obtaining it: They meeting, *Themiſtocles* demonſtrated that it was in the Power of the *Athenians* to make themſelves Maſters of all *Greece*, for the *Grecian* Naval Army was then in their Ports and Protection; whereupon *Ariſtides* replied, *The ſame was a Breach of Faith*: But it was anſwered, *It being for the publick, all conſiderations of that kind ought to be laid aſide*; whereupon *Ariſtides* being called by the People to give Report, told them, *Themiſtocles's advice was exceeding profitable, but diſhoneſt*, for which cauſe the People wholly refuſed it.

Famous was the Anſwer of the *Carthaginian* Senate to the *Romans* upon the aſſaulting of *Saguntum*: *Ego non privato publicove conſilio Saguntum oppugnatum, quærendum cenſeo; ſed utrum jure an injuria; noſtra enim hæc quæſtio atq; animadverſio in Civem noſtrum; eſt noſtrum an ſuo fecerit arbitrio, vobiſcum*

una diſputatio eſt, licueritine per fœdus fieri: Whether *Saguntum* was aſſaulted by private or publick Councel, we conceive it not to be made the queſtion; but this, Whether it was aſſaulted juſtly or unjuſtly; for to our ſelves an account is to be given by our Citizens, whether it did it of it ſelf, or by Commiſſion; with you alone this is diſputable, whether it were a violation of the League, or no. *Livius lib.* 31.

XI. If one party has violated the League, the other may moſt certainly depart from it; for the Tranſgreſſion of the Articles, be it never ſo little, makes a *Breach* of the *Agreement*, unleſs it be *otherwiſe* prevented by *Condition*, which may be, by inſerting into the ſame, * *that for every offence it may not be lawful to depart from the League*.

* *Grot. de Jure Belli ac Pacis, l.* 2. *c* 15. §. 15.

In fide quid ſenſeris, non quid dixeris cogitandum. Cic. de Off. 1.

XII. In all *Leagues*, the Thoughts of Princes and States are to be conſidered, not what they ſaid; yet becauſe internal acts are not viſible by themſelves, it is neceſſary that ſomewhat certain ſhould be determined, *i. e.* reduc'd to *Heads* or *Writings*, otherwiſe there would be no Obligation at all; for then every one might free himſelf by affixing on his own Words what Senſe he pleaſes. Hence it is, that by the dictates of *Natural Reaſon*, he, to whom any thing is promiſed, hath a Right to compel the Promiſer to that which right *Interpretation* ſuggeſteth, for otherwiſe the matter would have no end. And as the reducing of the Treaties into Writing makes the Agreements plain and obvious, ſo the mutual advance of the Miniſters proportionably haſtens the Accompliſhment. The Counts *Avaux* and *Servient*, being appointed for the Treaty at *Munſter*, as they paſſed through *Holland*, they entred into a Confederacy with thoſe States, wherein each Party reciprocally did bind themſelves by Articles, not only not to treat of any thing without the Aſſent and Participation of the other Collegue, but that the Treaty ſhould be carried on ſo equally, as if one of the Parties ſhould ſee the other's Buſineſs advance further than his, it ſhould be lawful for the one to deſire the other to proceed no further, till his Affairs were equally advanced: which Articles bounding the Approaches of each other, ſoon haſtened the end of that tedious Treaty.

Mormouth's Hiſtory of France fol. 28.

XIII. Again,

XIII. Again, in all Leagues and Treaties for Peace, there is this Exception to be ſuppoſed in the Contractors, unleſs ſome new Cauſe intervene, or unleſs it be by the default of him with whom the League and Compact is made, or Affairs continuing in the ſame poſture and ſtate in which they were at the time of the Contract: and that Saying of *Ulpianus* and *Pomponius* concerning private Compacts, *viz. That an Agreement is not violated from which a Man recedes upon a juſt reaſon and motive*; is by Interpreters extended to National Leagues betwixt Princes and States.

Qui promittit non offendere, is ſubintelligit exceptionem — Niſi cauſa ſupervenint, niſi culpa acceſſerit ejus cui promiſſio iſta ſit, & pactio fœderis, rebus ſic ſtantibus. Alber. Gentil. de Jure Belli, l. 3. c. 24.

XIV. In the *Interpretation* of Leagues and Truces, there ought be a very great Care had, in regard of the *Sacredneſs* of them; therefore in things promiſed or ſecured by ſuch Leagues, ſome are favourable, ſome odious, ſome mixt, or of a middle nature. Thoſe that are moſt favourable, are thoſe whoſe Words tend to Peace, not to War, whoſe Footſteps leave ever behind the deep Impreſſions of Miſery, Devaſtation, and Poverty, but more eſpecially when ſuch Leagues are made for *War Defenſive* than otherwiſe; but thoſe are called *odious*, which *burden* or *oppreſs* one part only, or one more than the other, and likewiſe ſuch as tend to matter of *Revenge* or *Puniſhment*, or to *violate* ſome former acts, or obligations, *or the bringing in a change or innovation of what hath been conſtantly ſetled, and uſed before*. Mixt, as where a Change is propounded; but that is with the Siſters of *Moderation* and *Peace*, which are proportionably good, according as the Change may be eſteemed. —— Therefore the Standard Rule is, *That in Leagues and Treaties* not odious, *the words are to be taken according to the full extent and propriety of popular uſe; and if there be more Significations, the largeſt is beſt*: On the other hand we are not to recur to Significations plainly improper, unleſs otherwiſe ſome abſurdity or inutility of the Agreement would follow. Again, Words are to be taken ever more ſtrictly than propriety ſuffers, if it be neceſſary for the avoiding of *inequity* or *abſurdity*. But if there be not ſuch neceſſity, *manifeſt equity* or *utility* in the Reſtriction, we are to ſtay them within the narroweſt Bounds of Propriety, unleſs the Circumſtances diſſwade. On the other hand in *Leagues* or *Promiſes odious*, even a figurative Speech is admitted to avoid the

In L. non poſſunt. D. de Legibus.

Vide exemplum in L. cum virum. C. de fidei commiſſis.

the *Odium*, or burden, therefore in *Donation*, *Remiſſion* of ones *Right*, *Dominion*, or *Property*, they are always to be conſtrued to thoſe things which were probably thought on, and really intended. So Aids and Succours promiſed from one part only, is to be underſtood to be due at the *charges of him who ſhall acquire them*.

Grotius lib. 1. *cap.* 16. §. 12.

Chap. IX.

Of Treaties of Truce, Neutrality, and Peace.

I. Of *Treaties, the various ſorts.*
II. Of *Rules in Caſes doubtful.*
III. Of *Truces amounting to a Peace.*
IV. Of *the Advantages between Treaties of Truce and Peace.*
V. *When promoted.*
VI. *Whether it can prejudice the Pretenſions of the Principal.*
VII. *How preſerved and puniſhed by the Laws of* England.
VIII. Of *Treaties of Neutrality, the various ſorts.*
IX. Of *the Advantages of the ſame.*
X. *In caſes of neceſſity where he ought to declare, and for whom.*

I. TReaties are either with *Enemies* or *Friends*, or with Perſons which deſire to continue *Neuters* with us, or we with them.

The Treaties which are made with our *Enemies* are either for *a time*, or *perpetual.*

Perpetual, as the Peace that is made to compoſe all differences, and the War that is undertaken for *Conqueſt*, or for *Reparation* of Injuries, or to *reſtore* the *Commerce*.

Treaties, which are made for a time with our Enemies, are called *Truces*; the which are either *general*, for all the States of the one or the other Prince, for all Perſons, and for all ſorts of *Commerce*: Or elſe they are *particular*, for certain *Places*, for certain *Perſons*, and for the *Commerce*, and ſometimes no further than a bare ſuſpenſion of Arms.

Truce, what it is.

A Truce is an Agreement, whereby tho' the War continue, yet all Acts of Hoſtility do for a while ceaſe, for between War and Peace there is no Medium, it is and may be called a War, tho' at preſent its Operations are intermitted. An Habit may be tho' at preſent it doth not operate. A Man may be ſaid to be Wiſe or

or prudent, tho' he be aſleep, and vertuous, tho' for a while he be void of Action. So that a Truce cannot be called a Peace, for tho' the Fight ceaſe, the War continues, 'tis but a bare Suſpenſion of the Acts of War.

Grot. de Jure Belli & pacis. lib. 3. c. 21. §. 1.

II. When any one is bound by *Alliance* not to make *Peace* or *Truce*, without the Conſent of his *Allie*, and whoſe Agreement ſeems doubtful, they add in the Treaty, that it ſhall take place for all thoſe the Contracters ſhall Name, and they ſet down no perfixed time, but that *it ſhall continue till he refuſe*, and ſome *reaſonable time aſcertained after*; as that which was made betwixt *Charles* the Eighth and the King of *Spain*.

In the Truce that was made between *Edw.* the 4th and *Lewis* the Eleventh, there was like proviſion made for *Charles* Duke of *Burgundy*, but he refuſed, and concluded a Peace for himſelf apart, being angry with *Edward* the Fourth for making the ſame. *Phil. Comin. lib.* 4. *cap.* 40. So *Lewis* the Eleventh concluded a Truce for Nine Years with *Edward* the Fourth when he had invaded *France*. *Phil. Comin. lib.* 4. *cap.* 8.

III. Sometimes a *general Truce* holds the place of *Peace*, as that of a hundred years. Such Truces are commonly made betwixt Princes that are *equal in Power*, as that betwixt *Spain* and *Portugal*, and will not *quit* any thing of their *Rights* by Peace; and yet deſire to live quietly in the State wherein they are, *ſatisfying by this Medium the point of Honour.*

IV. *Treaties of Truce* are many times leſs ſubject to *Rupture* than a *Peace*, which is made *perpetual*; for Princes or States that find themſelves aggrieved with a Treaty that is perpetual, ſeek out plauſible Reaſons to forſake it, ſeeing the Grievances cannot be otherwiſe repaired; but if the time be limited and expired, they may purſue that which they think *ought to be granted*, and the other may oppoſe; and if they have a deſire to continue the *Truce*, there is nothing ſo eaſie as to renew it. Hence it is become a *Maxime* in State, That ſeeing Treaties are grounded on the *Intereſts of Princes which change with the time, it is neceſſary to change and ſettle them at the end of the time, or to break them off*: for it is in vain to truſt to a bare Friendſhip.

V. A *Truce* is likewiſe made to advance a Peace, and to treat of it; and ſuch was the Truce of the *Hollanders* propounded at the Treaty of *Munſter*, who refuſed abſolutely it to

'Tis true, the *Swedes* and the other Confederates with

to liſten to any more than a Truce, and the Reaſon that they then gave was, that their Commonwealth was to be maintained by Arms, and that by admitting a Peace, the ſame might be a means to reduce it to weakneſs, which would in the end tend to the deſtruction of that State; nay, they offered the Truce on Terms, that if * *France* ſhould enter thereinto, ſhe ſhould oblige her ſelf upon any Breach to reaſſume War, and that Treaty of Truce was continued, which not long after was converted into a perpetual Peace.

France were for a Peace, and the Marquis *Caſtel Rodrigo* then offered a Blank unto the *Hollanders* which they might treat of at home.

* *Monmouth's* Hiſtory of *France, fol.* 28.

Again, *Truces* are ſometimes promoted for the more honeſt diſcharge of a *League*, which is made with ſome other Prince, whom they have accuſtomed to comprehend therein: ſo as a Peace following it, or a Truce not being accepted by him, they take occaſion to leave the League, *it being not his fault* that leaves it, that the War was not ended.

* For the Right remains with him, however he hath loſt the poſſeſſion.

VI. And although it ſeems that a *Truce* cannot by its condition prejudice the *pretenſion* in the *Principal*; yet it is moſt certain that if he which is chaſed out of a contentious State, conſents that during the *Truce the Commerce ſhall be forbidden to his Subjects, he doth wholly ſtop the gate*, as * *Lewis* the Twelfth did in the *Truce* which he made with *Gonſalve* after the Conqueſt of the Realm of *Naples*.

Grot. de Jur. Bell. ac Pacis, Lib. 2. *cap.* 16. §. 18.

VII. In *England* by the *Statute* of 2 *H.* 5. *cap.* 6. Robbery, Spoiling, breaking of *Truces* and *Safe-Conducts* by any of the King's Liege People and Subjects within *England*, *Ireland*, and *Wales*, or upon the main Sea, was adjudged and determined to be High-Treaſon, but this branch concerning High-Treaſon is repeal'd by the *Statute* of 20 *H.* 6. *cap.* 11. * 1 *E.* 6. *c.* 12. 1 *M. Seſs.* 1. *c.* 1. But by the ſaid *Act* of 2 *H.* 5. for the better obſervation of Truces and Safe-Conducts, *Conſervator Induciarum & ſalvorum Regis conductuum*, was raiſed and appointed in every Port of the Sea by Letters Patents: His Office was to inquire of all Offences done againſt the King's Truces and Safe-Conducts upon the main Sea (out of the Counties and out of the Liberties of *Cinque Ports*) as *Admirals* of Cuſtom were uſed to do. Sir *John Trebiel* was committed to the *Tower* for taking a *French* Ship, and being brought into *Parliament*, did there juſtifie the ſame; but at laſt confeſs'd his fault, and begged the King's Pardon †. Generally

2 *H.* 5. *cap.* 6.

* 20 *H.* 6. *cap.* 11.

† And at the requeſt of the Lords and Commons was pardoned, he making ſatiſfaction for the loſs. 11 *H.* 4. *ad Parliam. tent. quinden. Hil.* Vide *Cotton Abridgment.*

10 *E.* 4. 6. *B.* 15 *H.* 6. *c.* 3. 18 *H.* 6. *c.* 8. 20 *H.* 6 *cap.* 1. 14 *E.* 4. *c.* 4.

rally all Leagues and Safe-Conducts are, or ought to be of *Record*, that is, they ought to be *Inrolled in the Chancery*, to the end the Subject may know who are in Amity with the King, and who not; who be Enemies and can have no Action here, and who in League, and may have Actions perſonal here.

Sometimes they have been inrolled in the *Wardrobe*, as being matters of State. 19 E. 4. 6. B.

Note, *In all Treaties, the power of the one party, and the other, ought to be equal; nor are they to be held firm till ratified.* Maxime.

Before the Statute, when any breach of Truces or Leagues happened, or was occaſioned by the miſdemeanours of any of the King of *England's* Subjects, there did uſually iſſue forth Commiſſions under the *Great Seal* of *England*, to inquire of the Infringers of the ſame, and to puniſh and award Satisfaction to the injured. *Rott. Scotiæ de Anno. 10 E. 3. m. 36. intus, de puniendo illos qui contra formam Treugæ hominibus de Scotia conceſſæ delinquerint.*

VIII. *Princes* who neither love nor hate any thing abſolutely, ſeem generally inclined to *Neutrality*, and in that govern themſelves in their Friendſhips according to their Intereſts; and *Reaſon of State*, in effect is no other but *Reaſon of Intereſt*.

Neutrality may be of two ſorts; the one with *Alliance with either part*, the other *without Alliance*, or ſo much as the leaſt Tye to the one or other, which is that which properly may be called *Neutrality*.

The firſt is governed by the *Treaty of Neutrality*, the latter by the *Diſcretion of the Neuter Prince*, whoſe Carriage ought always to be ſuch, as that he may not give the leaſt glimpſe of inclining more to one than to another.

IX. The Advantages of Neutrality are, that the Neuter Prince or Republick is honoured and reſpected of both Parties, and by the fear of his declaring againſt one of them, he remains Arbitrator of others, and Maſter of himſelf.

And as a Neuter neither purchaſes Friends, nor *frees himſelf from Enemies*; ſo commonly he proves a Prey to the Victor: hence it is held more advantage *to hazard in a Conqueſt with a Companion, than to remain in a State wherein he is in all probability of being ruined by the one or the other.*

But

But Princes that are *powerful*, have uſed generally to preſerve a *Neutrality*; for whilſt Petty Princes and States ruin themſelves by War, he fortifies himſelf with *means*, and in the end, may make himſelf Judge of their Differences.

On the other hand it hath been conceived that Republicks that are weak, what part ſoever they take, it will be dangerous to them, eſpecially if they are in the midſt of two more powerful States than themſelves; but experience hath made it appear to the contrary, that *Neutrality* is more beneficial to a *weak Prince* or *Republick* ſo that they that are at War be not barbarous or inhumane. For although a Neutrality does not pleaſe either Party, yet in effect it wrongs no Man; and as he doth not ſerve, ſo he does not hurt: beſides his Declaration is reſerved till the Iſſue of the War, by which means he is not obliged, by ſiding with either party, to gain or loſe by the War.

Much practiſed by the Princes of the *Empire* and petty States.

X. But if the Neuter be preſt by Neceſſity to declare himſelf, he muſt do it *for the moſt powerful* of the two Parties, following that *Roman* Maxim, *That either they muſt make themſelves the ſtrongeſt, or be a Friend to the ſtrongeſt*: So they of *Strasburg* * declared for the *Empire* againſt the *French*. On the other hand, if the Neuter ſees, that joyning to the weaker, will balance the Power of the ſtronger, and by this Counterpoiſe reduce them to Reaſon; the ſame hath been generally followed upon the Maxim, *That the ſafety of States conſiſts chiefly in an equal counterpoiſe of the one, and the other; for as the greatneſs and opulency of a Prince draws after it the Ruin of their Neighbours, it is wiſdom to prevent it.*

* *Anno* 1674.

Conſul Quintus ad Achæos, quod optimum eſſe dicant non interponi vos bello: immo nihil tam alienum rebus veſtris eſt: Quippe ſine gratia vel dignitate præmium victoris eritis. *Lucius lib.* 35. *Scripta Ammirat. diſc. polit. l.* 18.

CHAP

CHAP. X.

Of the Immunities and Privileges of Ambaſſadors, and other publick Miniſters of State.

I. Of the Function of Ambaſſadors and Agents generally conſidered.
II. Of the Difference between Ordinary and Extraordinary.
III. Of the Qualifications and Matters requiſite to be in ſuch.
IV. Whether any but Sovereign Princes and States may qualifie ſuch, and who may not.
V. Of the Right of Ambaſſadors, how ſecured by the Laws Divine, and of Nations.
VI. Of Precaution, whether the ſame may be given to ſuch not to come, and attempting againſt ſuch: How to be dealt with, and of the puniſhment of thoſe that ſhall violate them by the Laws of England.
VII. How Princes and States may govern themſelves in reference to their Reception or Refuſal.
VIII. Whether Ambaſſadors may be ſubjected to Puniſhment when they offend againſt the Laws of Nations.
IX. Of proceeding againſt them by Princes and Republicks at this day, according to the Laws of Nations.
X. Whether privileged in that State or Country thro' which they paſs without leave; and of the various Proceedings againſt them by ſeveral Princes and States, illuſtrated in Precedents and Examples.
XI. Of proceeding againſt them according to the Laws of England.
XII. Where they forfeit their Privilege, according to the Laws of England, in things Capital.
XIII. Where preſerved in Matters ordinary not malum in ſe.
XIV. The Office of a publick Miniſter, what it includes in Matters Civil for the King and Nation whom they repreſent.
XV. Whether the Houſe of an Ambaſſador can be a Sanctuary to offenders, or that he may exerciſe Royal Juriſdiction over his own Domeſticks and Vaſſals.
XVI. Whether the Goods of an Ambaſſador are ſubject to ſeiſure for debts contracted by himſelf.
XVII. Outrages committed by Ambaſſadours, where a Forfeiture of their privilege.
XVIII. Of puniſhment on thoſe that ſhall offer Violence to their perſons.
XIX. Obſervations touching the Immunities and Governments of the publick Miniſters of Venice.
XX. How introduced by the Laws of Nations.
XXI. Wars whether juſt for Violation done to publick Miniſters.

I. AN *Ambaſſador* and *Agent* is the ſame thing, if we conſider only the Function of their Charges: only in this they differ; an *Agent* hath charge to repreſent

Coke 4. Inſtit. fol. 153.
Agents are

generally uſed when there is ſome Suſpicion that the Ambaſſadour will not be honoured as he ſhould be; therefore the *French* Kings of late Years have no Ambaſſadours in the *Emperor*'s Court, but Agents, becauſe of the Competition for Precedence betwixt him and *Spain*.

ſent the *Affairs* only; but an *Ambaſſadour* ought to repreſent the *Greatneſs of his Maſter, and his Affairs.*

II. Ambaſſadours are in two Capacities, either Ordinary or Extraordinary: The Ordinary or Lieger Ambaſſadors, are thoſe who are commanded to reſide in the Place whither ſent, unleſs they receive Letters of Revocation; and as the time of their Return is indefinite, ſo their Buſineſs is uncertain, ariſing out of emergent Occaſions, and commonly the Protection and Affairs of the Merchants, is their greateſt Care. The Extraordinary or *pro tempore* are thoſe that are imployed upon ſome particular great Affairs, or Condolements, or Congratulations, or for Overtures of Marriage, *&c.* Their Equipage is generally very Magnificent and Illuſtrious, and they may return without requeſting of Leave, unleſs there be a reſtraining Clauſe in their Commiſſion.

III. An Ambaſſador or Agent ought to be converſant in all ſorts of Hiſtory, reading with Judgment, and weighing all the Circumſtances of Action which are there repreſented, by which he will be qualified to know (but eſpecially of that Country whither he is ſent)

1. The Eſtabliſhment of Eſtates.
2. The Rights of Limits.
3. The Genealogies of Princes.
4. The Pretenſions of Kings upon the Eſtates of others.
5. Their Forces, Means, Alliances, and manner of living. Perſonally he muſt be

1. Reſolute and Couragious in that which he hath wiſely deliberated.
2. Secret in Affairs of Importance.
3. Diſcreet in his Speech.
4. No Detractor or Evil Speaker of any King or State, but more eſpecially of him or them with whom he remains.

5. One

5. One that will ſpeak freely of his Maſter's Pretenſions, if there be a Queſtion to maintain them.

IV. By the Laws of Nations, none under the Degree of a Sovereign Prince can nominate or ſend any in that Quality; nor can any Subject ſend or receive any Embaſſador, be he never ſo Great; if a Viceroy doth it, it is no leſs than High Treaſon; and ſo it was declared when the *Scots*, *inconſulto Principe*, ſent *Lowden* and others in Quality of private clancular Commiſſioners, to treat with the *French* King *Lewis* the Thirteenth, in the Name of the whole Nation for Aſſiſtance, the King would not admit or hear them. So did Queen *Elizabeth* when *Chriſtopher Aſſonville* came into *England* in Quality of a Miniſter of State, ſent from the Duke of *Alva* then Governour of *Flanders*, ſhe refuſed to admit him, he not having any Commiſſion or Credentials from the King of *Spain*. 'Tis true, the Electors and Princes of *Germany* have obtained the Privilege of ſending, and the Reception of Ambaſſadours, * but that is limited only to Matters touching their own Territories, and not the State of the Empire. And ſo likewiſe the *Hans* Towns may do the ſame; for they claim the like Privilege, they being free Imperial Cities, and partake of the ſame Regalia's, either by Preſcription or by Grants from former Emperours, whoſe Neceſſities enforced them to part with ſuch Royal Flowers of the Empire; and generally they † ſend for their Ambaſſadours always two Perſons, one of great Birth, and that hath been a Soldier, to maintain Decency; and the other a Doctor or Lawyer, to regulate Affairs with Learning, and by the Pen.

The Trumpeter that brought the Letters from the Maid of *Orleans* to the Earl of *Suffolk* was burnt; and the Reaſon of that was, becauſe he came from no lawful Prince, nor one commiſſionated, or capable of ſending a Trumpeter. *Grimſton*'s Hiſtory of *France*, *fol.* 326.

* That the *German* Princes may have ſuch a Prerogative, but it is *ſecundario tantum jure. Et qui jus mittendorum Legatorum ſecundario tantum jure habent, mittantur Legati non de Rebus univerſum concernentibus Imperium, ſed tantum ſui Territorii ratione; eo enim ipſis intuitu tantum datum, ultra igitur terminos non eſt procedendum, fieret enim alias prajudicium Imperatori, &c. Kirknerus* §. 25. Memorable was that of the *Switzers*, who ſent a Meſſage to the *French* King, that he ſhould not ſend them an Embaſſador with ſtore of Words, but a Treaſurer with Plenty of Money. † *Monmouth*'s Hiſtory of *France*, *fol.* 27, 28.

V. The Right of Embaſſadors is ſecured both by the Safeguard of Men, and alſo by the Protection of the *Law Divine*; therefore to violate this, is not only *unjuſt*, but *impious* too: And as *Protection* is given to the *Legates* of Supream *Rulers* by the *Laws of Nations*; ſo by the *Civil Law* there is a Protection likewiſe for *Provincial Le-*

Pompon. Leg. ſi quis D. de Legationibus.

gates, *Heralds*, and *Conſuls*. This Right of Legation was originally provided ſaith *Livy*, for a *Foreigner*, not a *Citizen*; yet, in Civil Wars, Neceſſity ſometimes makes Place for this Right beſides the Rule, as when the People are ſo divided into equal Parts, that it is doubtful on which Side the Right of Empire lieth, as that unhappy Spot of *Flanders*; or when the Right being much controverted, two contend for the Succeſſion to the *Throne*; for in this Caſe one Nation is reckoned as two; and ſo was the State of *England*, when the *Houſe* of *York* and *Lancaſter contended* for the *Crown*, properly then called Commiſſioners: Nay, this Right of *Legation* hath been ſo preſerved, that the very Meſſengers of Rebels have been protected, as were thoſe of *Holland* by *Philip* of *Spain*. So great a Reſpect have Nations had in all times to ſuch Men, that even * *Traitors*, nay *Pirates* and *Robbers*, who make not a Society, nor have any Protection by the *Law of Nations*, and with whom neither Faith nor Oath (as ſome conceive) may be kept, Faith being given them, obtain the Right of *Legation*, as once the Fugitives in the *Pyrenean Foreſt* did.

Liv. lib. 16.

Kings conquered in a ſolemn War, and deprived of their Kingdom with other Royalties, loſe the Right of Legation. *P. Æmilius* detained the Heralds of *Perſeus*, whom he conquer'd.

* *C. Poole* a Traitor fled to *Rome*; the *Pope* ſent him Ambaſſador to the *French* King, of whom the King of *England* demands his Subject, *ſed non prævaluit*. *Coke Inſtit*. 4. *fol.* 153.

VI. *Ambaſſadors* may by a *Precaution* be warned not to come; if they dare, they ſhall be taken for Enemies; but once admitted even with Enemies in Arms, much more with Enemies not in actual Hoſtility, have the Protection and Safeguard of the Laws of Nations; and therefore their Quality being admitted by Safe-conduct, they are to be preſerved as Princes; and ſo it was declared in *Parliament*, where the killing of *John Imperial*, Ambaſſador from the States of *Genoa*, was High-Treaſon, *Crimen læſæ Majeſtatis*.

Rot. Pat. 3. *R.* 3. *num.* 18.

† So likewiſe of *A. de Walton*, the King's Ambaſſador, *Nuncium Domini Regis miſſum ad mandatum Regis exequendum*, who was murdered by one *John Hill*, which Offence was adjudged High-Treaſon, and accordingly he was Drawn, Hang'd, and Beheaded.

† *Legatus ejus vice fungitur à quo deſtinatur, & honorandus eſt ſicut ille cujus vicem gerit, & Legatus violare contra jus Gentium eſt*, 22. *Aſſize pl.* 49. *Note*, This was three

Years before the making of the Statute of 25. *E.* 3. *quære* if ſuch a *Protex* is within the Statute at this Day.

And by the *Julian* Law, he that violates Ambaſſadors is guilty of publick Violence; that is of proſtituted Faith of publick Authority, and of a Breach of the Laws of Nations: And by the *Pontifical* Law, it is no leſs than a Piacle, and to be interdicted from the Benefit of holy things. *Philomela* ſung a fatal *Requiem* for the bloody Entertainment which ſhe gave the Ambaſſadors of *Frederick Barbaroſſa*, the Emperor having ſent them to treat in order to Peace; but they inſtead of that avowed the Action of thoſe that murdered his Ambaſſadors: The offended Emperor having taken the City, razed it to the Ground, and executed all the People therein as Rebels and Traitors againſt the Laws of Nations.

Qui violarit Legatum, Lege Julia de vi publica tenetur.

Fuller's Holy War, *l.* 3. *c.* 4.

VII. On the other Hand, Ambaſſadors may not always be received, though always they ought not to be rejected without Cauſe; for there may be Cauſe from him from whom they come, as the *Roman Senate* would not admit of the Embaſſage of the *Carthaginian*, whoſe Army was then in *Italy*; the King of *Spain*, thoſe of *Holland*; and the then *Pope*, the Embaſſador of *Henry* the Second after the Murder of *Becket* Archbiſhop of *Canterbury*: So likewiſe from the very Perſons that are ſent, as *Theodorus* the *Atheiſt*, whom *Lyſimachus* would not give Audience to; and Mr. *Oliver*, *Lewis* the Eleventh's Barber, whom they of *Gaunt* refuſed: Yet *Matthæus Palmerius*, an Apothecary of *Florence*, had better Fortune than the *French* Barber; for he being ſent in Quality of Embaſſador to *Alphonſo* King of *Naples*, and having acquitted himſelf Elegantly, and with much Generoſity at his firſt Audience, the King having Information that he was an Apothecary, ſaid, *Se tali ſono gli ſpeciali di Fierenze, quali debbono eſſere gli Medici? If the Apothecaries of* Florence *are ſuch, what ſhall we think of their Phyſicians?*

Camden 1571 *quaſi ibi propoſitar.* 4.

Daniel's Hiſtory of *Henry* 3. *Carolus quintus Imper. Galliæ, Venetorum, & Florentinorum ad bellum ſibi inditendum miſſos deduci juſſit in locum qui à comitatu ſuo abeſſet, triginta milliar. erca Guic. l.* 18. *Bellaius l.* 3.

So likewiſe where the Cauſe of ſending is ſuſpected, in reference to diſturb the People, or with Intentions rather to ſow Sedition, than to conclude a Peace (if ſuch be their Errand) or not honourable, or unſeaſonable. As for thoſe aſſiduous Legations which are now in uſe, they may with very good Right be rejected; for the no Neceſſity of them appears

As my Lord *Bacon* obſerves in the Life of that Prince.

appears by the ancient Cuſtom whereto they are unknown, which made *Henry* the Seventh admit of none.

The *Venetian* having admitted *Henry* the Fourth of *France* his Embaſſador, yet they interdicted him * to come with the other Embaſſador to the *Chapel*, till the King was reconciled to the *Church of Rome*.

* *Card. Arnold. Oſſat* in his 353 Epiſtle. *Coke* 4 *Inſtit. fol.* 153.

VIII. By the Laws of Nations, only unjuſt Force is kept from the Bodies of Embaſſadors; for if the Laws of Nations be broken by him, he is ſubject to Puniſhment: Yet the Opinions of Nations, and Men eminent for Wiſdom, have been doubtful in this Point, and Precedents on both Sides have been avouched: One which ſeems to refute that Poſition of puniſhing ſuch Miniſters of State: The Embaſſadours of *Tarquin*, who had committed Treaſon at *Rome*, and as * *Livy* obſerves, were in the State of Enemies; yet the *Right of Nations* (as he calls it) *prevailed ſo far as to preſerve them, though in a Caſe of Hoſtility*. On the other Hand, † *Saluſt* obſerves, that *Bomilcar*, one of the *Carthaginian* Embaſſadours, who came to *Rome* on the publick Faith, *was adjudged Guilty, rather* (ſaith he) *by the Rules of Equity, than by the Laws of Nations*: Equity, that is the mere *Law of Nature*, ſuffers Puniſhment to be exacted where there is found a Delinquent, but the *Laws of Nations* except the Perſons of *Ambaſſadours*: for certainly their Security out-weighs *the Profit ariſing from Puniſhment*, which may be inflicted by him that hath ſent him (if he be willing) if unwilling, it may be exacted of him as an Approver of the Crime.

Menander Protector Juſtino Imper. Avarorum Legatos contra jus Legationum in vinculis habuit, *Cothmann. Reſp.* 32. n. 29. *Coke Inſtit.* 4. 153. 2 *H.* 5. *cap.* 6. 1 *M. Seſs.* 1. *c.* 1.

* *Quanquam viſi ſunt commiſiſſe ut hoſtium loco eſſent jus tamen Gentium valuit.*

† *Fit reus magis ex equo bonoque quam ex jure Gent. Bomilcar comes ei qui Romam fide publica venerat.* An Enemy is bound to whom they are ſent; but their Privilege obliges not thoſe through whoſe Bounds they paſs without Leave; for if they go to, or come from their Enemies, or make any hoſtile Attempt, they may be ſlain. *Liv. lib.* 26.

IX. Again, as *Ambaſſadours* are not to render a *Reaſon of their Actions to any other*, but to *him* by whom they are ſent; ſo it is impoſſible, by reaſon of various *Intereſts* and other *Secrets* of State, which paſs through their Hands, but ſomewhat may be ſaid, which bears a Show or Face of Crime; (which perhaps may prove otherwiſe) yet the examining and tracing of the Truth, may be of a dangerous Conſequence; and therefore if the Offence be ſuch

Grotius de Jure Belli ac Pacis, *l.* 2. *c.* 18. §. 4. 4, & 5. *Senatus faciem ſecum attulerat auctoritatem Reip. M. Tull.* 8.

ſuch as may be contemned, it is uſually to be diſſembled or connived at, or elſe the Embaſſadour be commanded to depart the *Realm*; and if the Crime be cruel, and publickly miſchievous, the Embaſſador may be ſent home with *Letters of Requeſt* to his Maſter, to inflict Puniſhment according to the Offence: So likewiſe in the Precaution of a great Miſchief, eſpecially publick, (if there be no other Remedy) Embaſſadours may be apprehended and executed; and if they oppoſe by Force of Arms; they may be ſlain.

Coke Inſtit. 4. *fol.* 152.

Sic Carolus quintus Legato Ducis Medi:olanenſis ut ſubditi ſui imperavit, ne à Comitatu ſuo abſcederet, Guicciard. in Dict. jam loc. Vide Cambden's Eliz. Anno 1571. 1584.

In the Biſhop of *Roſs*'s Caſe, *An.* 13 *Eliz.* the Queſtion was, *An Legatus qui rebellionem contra Principem ad quem legatus concitat, Legati privilegiis gaudeat, & non ut hoſtis pœnis ſubjaceat*; and it was reſolved, That he had loſt the Privilege of an Ambaſſadour, and was ſubject to Puniſhment; nor can Ambaſſadours be defended by the Law of Nations, when they commit any thing againſt the State or Perſon of the Prince with whom they reſide.

Hill. 13 *Eliz.* Biſhop of *Roſs*'s Caſe *Co.* 4 *Inſt. fol.* 152.

X. And why Embaſſadours are in Safety in their Enemy's Countries, and are to be ſpared when they commit Offences, is not ſo much for their own or *Maſter*'s ſake, *but becauſe without them there will never be an End of Hoſtility, nor Peace after War*: Neither is the *Name* or *Perſon* of an *Ambaſſadour* ſo inviolable, either in Peace or in time of War, but there may be both a convenient time and a good Occaſion to puniſh them, and this ſtanding with the Laws of Nations, as may appear by theſe following Examples.

1\. The Law does not pertain to them through whoſe Bounds Ambaſſadours paſs without Leave; for if they go to their Enemies, or come from their Enemies, or make any hoſtile Attempt, they may be ſlain: So the *Athenians* did to the Ambaſſadours between the *Perſians* and *Spartans*; the *Illyrians* to the Ambaſſadours between the *Eſſeans* and *Romans*.

Thucyd. lib. 2. *Appian de Bello Illirico Siculi Atheninſium Socii Legatos Syracuſanorum miſſos ad Civitates alias cepere.*

2\. The Emperor *Charles* the Fifth, advertiſed of the League made againſt him, would not diſmiſs the Ambaſ-

Thucyd. lib. 2.

ſadors of *France*, *England*, and *Venice*, till his own were in Safety, but he ſets Guards upon thoſe of *France*, *Venice*, and *Florence*, cauſing them to be conducted thirty Miles from his Court, with a Prohibition not to ſpeak to them, nor for them to write. As to him of *Milan*, as his Subject, he was enjoyned not to part from Court; but as for him of *England*, there was no Alteration.

De Gallorum ad Turcam legatis, quos in Pado Hiſpani cepere occiderunt, vide Judicia Peruta, lib. 11.

Camden Eliz. Anno 1571.

History of the Republick of *Venice*, *fol.* 450, 451.

3. The *Venetians* having deſtroyed ſome of the *Corſairs*, *Amurath* commanded *Luigi Contarini*, then *Bailio* of *Venice* to be impriſoned.

4. The *Seigniory of Venice* underſtanding that certain Traitors, who had revealed their *Secrets* to the *Turk*, were fled for Protection into the Houſe of the *French* Ambaſſador at *Venice*, ſent Officers to ſearch the Ambaſſador's Houſe; but the Ambaſſador refuſing them Entrance, the *Senate* commanded certain Cannon to be brought out of the *Arſenal* to beat down his Houſe, which when he ſaw planted, he ſurrendred up the Traitors.

5. The Embaſſadors of *Tarquin*, *Morte affligendos Romani non judicarunt, & quanquam viſi ſunt ut hoſtium loco eſſent, jus Gentium tamen valuit.*

Goodwin de Leg. Antiq. Rom.

6 The *State of Rome*, though in caſe of moſt Capital Crimes, exempted the *Tribunes* of the People from Queſtion during the Year of Office.

Acta Trident Concilii.

7. The Embaſſadors of the *Proteſtants* at the *Council of Trent*, divulging there the *Doctrine* of the Church, contrary to a *Decree* there, whereby it was enacted a Crime equivalent to Treaſon, yet ſtood they protected from any Puniſhment.

Pompon Leg. ult. D. de Legatis.

It is generally conſented by all the *Civilians*, That *Legis de jure Gentium indictum eſt, & eorum corpora ſalva ſint, propter neceſſitatem Legationis, ac ne confundant Jura commercii inter Principes.*

Benedict. in Vita Hen. 2.

8. *Viva*, the *Pope*'s *Legate*, was reſtrained by *Henry* the Second for exerciſing a Power within his Realm, not allowed or admitted of by the King, in Diſquiet of the State, and forced to ſwear not to act any thing *in prajudicium Regis vel Regni.*

On the other hand, it hath been anſwered, That they are by the Laws of Nations exempted from Regal Trial, all Actions of one ſo qualified, being made the Acts of his Maſter, or of thoſe whom he repreſents, until he or they

they diſavow; and Injuries of one *Abſolute Prince* or *State* to another, is *factum hoſtilitatis*, and not *Treaſon*; the Immunity of whom *Civilians* collect, as they do the reſt of their Grounds from the Practice of the *Roman State*, deducing their Arguments from theſe Examples.

9. The *Fabii* Embaſſadors from *Rome*, were returned ſafe from the *Chades*, with demand of Juſtice againſt them only, although they had been taken bearing Arms with the *Etrurians* their Enemies. *Colloquium Machiav. l.* 2. *c.* 28. *Liv.* 2. *Dec.*

10. King *Edward* the Second of *England*, ſent amongſt others a *French* Gentleman Embaſſador into *France*; the King upon this arraigned him as a Traitor, for ſerving the King of *England* as Embaſſador, who was his Enemy (but the Queen procured his Pardon.) Sir *Robert Cotton*'s *Poſthumus.*

11. *Henry* the Third did the like to one of the *Pope*'s Embaſſadors, his *Collegue* flying the Realm ſecretly, fearing, *timens pelli ſui*, as the Records have it. *Edward* the Firſt reſtrained another of the *Pope*'s turbulent Embaſſadors, till he had (as his Progenitors had) informed the *Pope* of the Fault of his *Miniſter*, and received Satisfaction for the Wrongs. *Rott. Scaccar. Weſtm. Clauſe Edw. primi.*

12. *Henry* the Eighth commanded a *French* Embaſſador to depart preſently out of the Realm, becauſe he was the profeſſed Enemy of the See of *Rome*.

13. *Lewis de Prat*, Embaſſador for *Charles* the Fifth, was commanded to his Houſe, for accuſing falſly Cardinal *Woolſey* to have practiſed a Breach between *Henry* the Eighth and his Maſter, to make up the Amity with the *French King*. Lord *Herbert*'s Hiſtory *Vita H.* 8. *Anno* 1523.

14. Sir *Michael Throgmorton*, by *Charles* the Ninth of *France*, was ſo ſerved, for being too buſie with the Prince of *Conde*'s Faction.

15. The *Pope's* Embaſſador at *Paris*, was arraigned for practiſing certain Treaſons in *France* againſt the King in the Parliament of *Paris*, and was there found guilty and committed to Priſon.

16. Doctor *Man* then Embaſſador was taken from his Houſe at *Madrid* in *Spain*, and put under a Guard to a ſtraiter Lodging for breeding a Scandal (as the *Conde Teri* ſaid) in uſing by Warrant of his Place, the Religion of his Country, although he alledged the like permitted to *Guzman de Silva* their Embaſſadour in *England*, and to the *Turk* no leſs than in *Spain*. *Cambden*'s Hiſtory *Vita Q. Eliz. A.* 1567.

Guicciard. lib. 18.

17. *Francis* the Firſt, King of *France*, ſent *Cæſar Fregoſus* and *Anthony Rincone*, Ambaſſadors to the *Turk*; they were ſurprized by the Armies of *Charles* the Fifth on the River *Po* in *Italy*, and were put to Death; the *French* King complained that they were wrongfully murdered; but the *Emperor* juſtified their Death; for that the one was a *Genois*, and the other a *Milanois*, and his Subjects, feared not to ſerve the King his Enemy.

Lord *Herbert*'s Hiſtory of *H.* 8.

18. *Henry* the Eighth being in a League with the *French* and at Enmity with the *Pope*, who was in League with the *French* King, and who had ſent Cardinal *Pool* to the *French* King, of whom King *Henry* demanded the *Cardinal*, being his Subject, and attainted of Treaſon, *ſed non prævaluit.*

19. *Samuel Pelagii*, a Subject to the King of *Morocco*, pretended that he was an Ambaſſador ſent unto the *States General* of the *United Provinces*; he came to them, and accordingly they treated with him, afterwards he departed; and being upon the Sea, he there took and ſpoiled a *Spaniſh* Ship; and then came into *England*; the *Spaniſh* Ambaſſdor here having received Intelligence of the ſpoliation, cauſed his Perſon to be ſeized upon, intending to proceed againſt him as a Pirate, and impriſoned him, and upon Conference with the Lord *Coke*, *Dordridge* and other Judges and *Civilians*, they declared their Opinions, That the Caption of the *Spaniard*'s Goods by the *Morocco* Embaſſadour, is not in Judgment of Law a *Piracy*, in regard it was apparent that the King of *Spain* and the King of *Morocco* are Enemies, and the ſame was done in *open Hoſtility*; and therefore in Judgment of Law could not be called *Spoliatio, ſed legalis Captio*; and a Caſe out of 2 *R.* 3. *fol.* 2. was vouched, where a *Spaniſh* Merchant before the King and his *Council, in Camerâ Scaccarii*, brought a Bill againſt divers *Engliſh-men*, therein ſetting forth *quod deprædatus & ſpoliatus fuit* upon the Sea, *juxta partes Brittaniæ, per quendam Virum bellicoſum de Britannia de quadam Navi*, and ſo of divers Merchandizes therein which were brought into *England*, and came into the Hands of divers *Engliſh-men*, naming them, and ſo had Proceſs againſt them, who came in, and pleaded, That in regard this Depredation was done by a Stranger, and not by the Subjects of the King, therefore they ought not to be puniſhed; in regard that the *Statute* of 31 *H.*

6. *Cap.*

6. *Cap.* 4. gives Reſtitution by the *Chancellor, in Cancellaria ſibi vocato uno Judice, de uno Banco vel altero*; and by the *Statute* of 27 *Ed.* 3. *Cap.* 13. that the Reſtitution may be made in ſuch a Caſe upon Proof made, by the *Chancellor* himſelf without any Judge; and upon that Caſe it was reſolved, *Quod quiſquis extraneus, &c.* who brings his Bill upon this *Statute* to have Reſtitution, *debet probare quòd tempore captionis fuit de amicitia Domini Regis*; and alſo *quod ipſe qui eum ceperit & ſpoliavit, fuit etiam ſub obedientia Regis, vel de amicitia Domini Regis, ſive Principis querentis tempore ſpoliationis, & non inimicus Domini Regis ſive Principis querentis, quia ſi fuerit inimicus, & ſic ceperit bona, tunc non fuit ſpoliatio, nec deprædatio, ſed legalis captio, prout quilibet inimicus capit ſuper unum & alterum*: the Judgment of which Caſe was held to be Law, and thereupon the Judges delivered their Opinions, that the *Morocco* Embaſſador could not be proceeded againſt as a Pirate. 3 *Bulſtrod* 28. 1 *Ro. Rep.* 175.

20. In the time of *Philip* the Second of *Spain*, the *Venetian* Embaſſador in *Madrid* protecting one *Bodovario*, a *Venetian*, an offender, that fled into his Houſe, and denying the *Corrigidor* or *Juſtice* to enter his Houſe, where the Embaſſador ſtood Arm'd to withſtand them; upon complaint made, the Embaſſador was removed unto another Houſe, till they had ſearched, and found the Offender; then conducting back the Embaſſador with all due reſpect, a Guard was ſet upon his Houſe to ſtay the fury of the enraged People; the Embaſſador complaining to the King, he remitted it to the *Supreme Council*: they juſtified the Proceedings, condemning *Bodovario* to loſe his Head, and other the Embaſſador's Servants to the *Gallies*, all which the King turned to Baniſhment; and to ſatisfie the moſt *Serene Republick*, ſent the whole proceſs to *Inego de Mendoza* his Embaſſador at *Venice*, declaring by a publick Ordinance unto that *State*, and all other Princes, *That in caſe his Embaſſadors ſhould commit any offence unworthily, and diſagreeing to their Qualities and Profeſſions of Embaſſadors, they ſhould not enjoy the Privilege of thoſe Officers, but he would refer them to be judged by the Laws of that Prince or State where they then reſided, and where they had injured.* It was a great and noble Saying. Sir *Hen. Wootton*: State of Chriſtendom, *fol.* 211. *Vide* Sir Robert *Cotton's poſthum.* and the Propoſition to King *James*.

21. In the Year 1568. *Don Gubernon d'Eſpes* was ordered to keep his Houſe in *London*, for ſending ſcandalous Letters to the Duke *de Alva* unſeal'd, and in 1586.

Don

Don Bernardino de Mendoza, was reſtrained firſt, and after commanded away.

XI. The manner of proceeding againſt them, according to the practice in *England*, hath been conceived neceſſary to be, that ſome of the Chief Secretaries of State were ſent to the Embaſſadors, and by way of advice, that underſtanding that the Common People having receiv'd notice of, *&c.* " And that they cannot but conceive a juſt fear of uncivil carriage towards their *Excellencies* or their Followers, if any the leaſt Incitement " ſhould ariſe, and therefore for Quiet of the State, and " ſecuring of their Perſons, they were bound in love and " reſpect to their *Excellencies* to reſtrain as well them- " ſelves as Followers, till a further Courſe be taken by " legal Examination, where the Aſperſion began, the " ſame being in their opinions the beſt and the only way " to prevent the danger, *&c.*

Sometimes, if the *Parliament* be ſitting, the King acquaints the *Lords*, and then departs; who having had Conference with the *Commons*, conclude of a *Meſſage* to be ſent to the Embaſſadors, (either by requiring an account of the matter or confining of them) the Perſons to be ſent, the two *Speakers* of both *Houſes*, with ſome convenient number of either, having their Maces, or Enſigns of Offices born before them to the Embaſſador's Gates, and then forborn; and then requeſting ſpeech with them, let them know that a Relation being made that Day, in open *Parliament* of, *&c.* they were deputed from both *Houſes*, *the Great Council of the Kingdom*, to the which by the Fundamental Laws of this Nation, the chief care of the King's Safety, and the publick Peace and Quiet of the Realm is committed; and that they were no leſs the *High Court of Juſtice*, or *Superſedeas* to all others, for the examining and puniſhing all Attempts of ſo high a nature, *&c.* if it carry truth; and having executed their Commiſſion, conclude that the Houſes, to ſhew that reverence which they bear unto the Dignity of his *Maſter* by their *Meſſage*, declare that they two who are never imployed but to the King alone, were at that time ſent, *&c.* and if the Houſes ſhall upon return of their *Speakers* conceive their Anſwers (if it be a Matter that requires it) are ſuch as may juſtly deſerve their being confined, they then

then make an addreſs to his *Majeſty* to confine them to their Houſes, reſtraining their departure till the Prince or State, whom they repreſent, be acquainted with their offence: And ſo it was done in 44 *H.* 3. to the *Pope's Legates* in *England*, and 28 *E.* 1.

The *Parliament* not ſitting, the Secretaries of State may ſignifie the like, if occaſion, *&c.*

XII. If a Foreign Ambaſſador, being a *Prorex*, commits here any Crime which is *contra Jus Gentium*, as Treaſon, Felony, Adultery, or any other Crime which is againſt the Law of Nations, he loſeth the privilege and dignity of an Ambaſſador, as unworthy of ſo high a place, and may be puniſhed here as any other private Alien, and not to be remanded to his Sovereign but of courteſie.

The opinion of the Lord *Coke*, 4 *Inſtit. fol.* 153, *&c.*

XIII. But if any thing be *malum prohibitum* by any Act of *Parliament*, private Law, or Cuſtom of this Realm, which is not *malum in ſe Jure Gentium*, nor *contra Jus Gentium*, an Ambaſſador reſiding here, ſhall not be bound by any of them; but otherwiſe it is of the Subjects of either Kingdom; for if a *French* Merchant or *Spaniſh* Merchant trades or imports any prohibited Goods, he muſt at his peril obſerve the Laws of *England*; and ſo it was adjudged *Paſc.* 33 *Eliz.* in the *Exchequer*, *Tomlinſon*, *qui tam verſus Henry de Vale & al.* upon the *Statute* of 19 *H.* 7. *Cap.* 21. but if an Ambaſſador imports any prohibited Goods, *è contra.*

The *Florentines* having ſent Ambaſſadors to *Charles* the Fifth and *Clement* the Seventh, being then at *Bolonia*, together with their Houſhold-ſtuff, they brought covertly many rich Commodities to ſell and traffick with, ſuppoſing that they might be free from paying the Gabel; but the Searchers of the Cuſtom-houſe having diſcovered it, they became objects of laughter and mirth to the *Bolonians*, and for that, as unworthy of the Office of Ambaſſadors, were remanded home without Audience.

Jovius fol. 125.

Sir *Thomas Challoner* having been ſent Ambaſſador to *Spain* by Queen *Elizabeth*, remitted a Complaint to the Queen, that his Cheſts had been ſearched: upon which the Queen demanded the opinion of her Council in the point, who upon the whole matter reſolved the Action into this, *Legato omnia æqui bonique ferenda dummodò Principis Honor non directè violetur*, the very words of Mr. *Camden*, An Embaſſador muſt bear all things patiently, provided

vided that the Honour of the Prince (whom he ſerves) be not directly violated.

Leg. ſi F. de lega. in aut. de ſanctiſſ. §. rerum, coll. 9.

XIV. The Office of an Embaſſador does not include a protection private but publick, for the King is Maſter, nor for any ſeveral Subject otherwiſe than as it concerns the King and his publick Miniſters, to protect them, and procure their protection in foreign Kingdoms, in the nature of an *Office* and *Negotiation of State*; therefore their Quality is to mediate and proſecute for them or any one of them, at the *Council-Table*, which is as it were a *Court of State*; but when they come to ſettled Courts, which do and muſt obſerve eſſential forms of proceeding, *ſcil. proceſſus legitimos*, they muſt be governed by them: And therefore in the Caſe of *Don Diego Serviento de Acuna*, *Ambaſſador Lieger* for the King of *Spain*, who libelled in the *Admiral Court* as *Procurator General* for all his Maſters Subjects, againſt one *Jolliff* and *Tucker*, and Sir *Richard Bingley*, for two Ships and their Lading of divers kinds, of the Goods of the Subjects of the King of *Spain* generally, and not naming of them *adduct ad Port de Munſter*, in the Preface of the Libel generally againſt them all, and then proceeds and charges them ſeverally thus; That *Jolliff* and *Tucker* Captain *Piratæ*, *in alto Mari bellicè dictas Naves aggreſſi ſunt*, *& per vim & violentiam* took them, and that they were *adductæ in partes Hiberniæ*, and that coming into the hands of Sir *Richard Bingley*, he converted them to his own uſe, (not ſaying where) and refuſing to render them being required, it was there held that a *Prohibition* ſhould go, for the matter is Tryable meerly at the *Common Law*, and that ſuch a Procuration was not good, though to an Embaſſador.

Lord *Hobart*, *fol.* 78. *Sed Vide Cro. El.* 685. *Yelv.* 135, 173. *Hard* 183. 1 *Sid.* 320, 367. 2 *Saund.* 260. 2 *Lev.* 25. 3 *Ven.* 173, 208.

Don Alfonſo de Valeſco Embaſſador from the *Catholick* King, attached Tobacoes at Land here, which one *Corvero* a Subject of the King of *Spain*, brought hither, and the Embaſſador by his Libel ſuppoſed to belong to his Maſter, as Goods confiſcated, as all other his Goods were. Sir *John Watts* the Plaintiff in the ſuggeſtion, prayed a *Prohibition*, which was granted accordingly, for the property of Goods here at Land muſt be try'd by the *Common Law*, however the Property be guided; and it was likewiſe rul'd, that if any Subject of a Foreign Prince bring Goods into this Kingdom, though they were confiſcate before,

before, the Property ſhall not be queſtioned but at the *Common Law*, *Don Alfonſo verſ. Corvero*, *Mich.* 9 *Jac.* *Hob.* 212. *Hill.* 9 *Jac.* upon the like Libel by *Don Pedro Surega* Embaſſador for *Spain*.

XV. Whether an Embaſſador hath Juriſdiction over his own Family, and whether his houſe be a *Sanctuary* * for all that fly into it, depends upon the conceſſion of him with whom he reſides, for this belongs not to the Law of Nations †; and it hath been ſeen that an Embaſſador hath inflicted puniſhment on his own Servants and Vaſſals, as the *Moſcovite* did here in *England*, but that muſt be purely by conceſſion, as the *Turk* permits it to the *Engliſh* Embaſſador at *Conſtantinople*: But for Fugitives that fly into their Houſes, nay, their own Servants if they have greatly offended, cannot be drawn out by force, without a Demand and Refuſal; which when done, it is then become as an offence in them.

* *Diſtingui ſerme hac in re ſolent crimina. Vide Parutam, lib.* 10. *ubi Rex Galliæ hanc ob cauſam iratus pacatur: Vide eundem, lib.* 11.

† *Grot. de Jure Belli ac Pacis lib.* 18. §. 4, 5, 6, 7.

XVI. Moſt certain by the *Civil Law*, the moveable Goods of an Embaſſador, which are accounted an acceſſion to his Perſon, cannot be ſeized on, neither as a pledge, nor for payment of a Debt, nor by *Order* or *Execution of Judgment*; no nor by the King or *States* leave where he reſides (as ſome conceive) for all coaction ought to be far from an Ambaſſador, as well that which toucheth his neceſſaries as his Perſon, that he may have full ſecurity; if therefore he hath contracted any Debt, he is to be called upon kindly, and if he refuſes, then *Letters of Requeſt* are to go to his Maſter *; ſo that at laſt that courſe may be taken with him as with Debtors in another Territory; to ſome this may ſeem hard, yet Kings, who cannot be compelled, want not Creditors; but the Lord *Coke* ſeems to be of another opinion †, for as to Contracts and Debts that be good *Jure Gentium*, he muſt anſwer here.

Rex fuiſſenemetu regium nuntium populi Romani Quiritum vaſa comiteſq; meos: yet an Ejectment hath been brought and left at the Houſe of the Embaſſador, and it was allowed good, and conceived no breach of their privilege in the Caſe of *Monſ. Colbert* for *York*-Houſe, *Mich.* 28 *Car.* 2. *in Banch. Reg.* * *Grotius de Jure Belli ac Pacis, lib.* 2. *cap.* 18. † *Coke* 4 *Inſtit. fol.* 153. Certain it is that none dareth preſume to meddle either with their Perſons, Goods, or Servants, without leave had, the contempt of which hath been puniſhed with Impriſonment.

XVII. If an Embaſſador commits any private *outrage* againſt one of the Princes Subjects with whom he reſides, unleſs it be to defend the Dignity of his Charge, or of his

Maſter,

Maſter, it hath been conceived by ſome not to be juſtifiable before the Prince with whom he reſides; (ſay they) there is a great difference between the *Dignity*, and *Authority* of the Prince in the Country of another Soveraign, for he may well retain his *Dignity*, but not his *Authority*. Uſually Injuries of that nature being done, they have admitted debates at a *Council of State*, where the Soveraign, with whom the Miniſter of State hath reſided, being ſatisfied, that Reparation ought to be made to the party injured, he hath been ordered, or at leaſt requeſted, to comply with the ſame.

XVIII. But on the other hand, if any private *outrage* be committed by the Subjects of that Prince with whom he reſides, upon his Perſon, the Offenders may be ſubjected to puniſhment. The Queen of *Sweden* having made the *Incomparable Grotius* (after he had eſcaped by Providence out of Priſon, and by a greater from his *Country-men*) her Embaſſador with *Lewis* the Thirteenth, with whom he reſided at *Paris*, coming one day from S. *Germans*, the *Secretary of Ceremonies* being in the Coach with him, it chanced that in one place as they paſſed, a great number of People were in the way ſeeing of an Execution, his *Poſtilion* and *Coach-man* driving boldly through the Company, the *Archers* then attending the Execution with ſhort Pieces, (concerned ſomewhat angerly that the Execution was diſturbed) made after the Coach, ſhot his *Poſtilion* and *Coach-man*, and through the Coach, even through his Hat: the matter coming to be examined, the King ordered three or four of them to be hang'd, but that *Good Man* firſt pardoned them himſelf, and then obtained the King's.

Barkſeate in memor. Grotii.

XIX. The Republick of *Venice* imployeth generally more Embaſſadors abroad than any other State, and they are as thoſe of other Princes be, *Ordinary* and *Extraordinary*; the Commiſſion of the Ordinary continueth for three Years, but he who reſides at *Conſtantinople* is not called Ambaſſador, but *Bailio*, reſiding there perpetually; and that Republick allows him a greater Proviſion to ſupport his *Grandeur*, than to any other, and by the Laws of *Venice* whatſoever he expends is allowed him upon his accounts without any examination: to which no other of their publick Miniſters of State have like privilege.

By

By the Laws of *Venice* there can be no Extraordinary Ambaſſador imployed, unleſs they have been Ambaſſadors formerly, and upon their return are ſtrictly examined of their Comportment in their Legation, and are to diſcover what Preſents they have received from the Prince or State to whom they were ſent, the concealment of which is of a very dangerous conſequence. *Bodinus de Rep. lib.* 3.

Nor may any of their Ambaſſadors receive any Preferment from any other State during their Legation. The *Patriarch of Aquileia* dying, *Hermolao Barbaro* being there Ambaſſador for that *Republick*, the *Pope* conferred on him that *Eccleſiaſtical Dignity*, and made him a *Cardinal*; which being known at *Venice*, notwithſtanding he was a Perſon of great Merit, and had given notice to the *Senate*, rich, well allied, and had good Friends, they ſent expreſs command that he ſhould reſign the *Patriarchſhip*, otherwiſe they would take from his *Father* the *Procuratorſhip* of St. *Mark*, and confiſcate all his Eſtate. *Jac. Aug. Thuanus, l.* 27. *in Vita Auguſtini Barbadico* Duke of *Venice*, *An.* 1486.

But if ſuch Ambaſſadors have received any Preſent, Gift, or Reward from any Foreign Prince or Republick, and ſuch Miniſters of State are thought worthy of retaining the ſame, ſuch a Grace muſt paſs by the Suffrage of the Senate, to oblige them more to the benevolence of the Republick, than to the bounty of any Foreign Prince. The conſideration of which put the ſame generous ſcruple into the Breaſt of Sir *Amias Paulet*, who returning from his Ambaſſy in *France*, would not at his departure receive from the *French* King the Chain of Gold which is given of courſe, till he was half a League out of *Paris*. But more famous was the late action of Sir *Leolin Jenkins*, His Majeſty's Embaſſador at *Nimeguen*, who, though after the Treaty concluded, abſolutely refuſed the *French* King's Preſent. *Paulus Paruta in Hiſt. Ven. lib.* 7. *Francis Hotteman, fol.* 23. 24.

XX. By the Laws of Nations, in the Reception of Embaſſadors, thoſe from a King are generally introduced by an Earl or Count, thoſe from a Duke or Republik by a Baron; nor are they to be allowed that Honour but only at their firſt and laſt Audience.

XXI. Prophane Hiſtories are full of Wars becauſe of wrong done to Ambaſſadors; and in the Sacred Story is extant the memory of the War which *David* upon that Ground waged againſt the *Ammonites*: nor doth *Cicero* eſteem

esteem any Cauſe more juſt againſt *Mithridates*; and at this day not only *Lawyers* *, but *Divines* † are all of the ſame opinion, That a War cannot be more juſtly commenced than for the Violation done to their Publick Miniſters.

* *Grot. de Jure Belli ac Pacis, l.* 2. *c.* 18. §. 11.

† *Montague* Biſhop of *Norwich*'s Acts and Monuments of the Church, *fol.* 450.

Chap. XI.

Of the Right of delivering Perſons fled for Protection.

I. *Where Superiors may become culpable for the Crimes of their Subjects.*
II. *Offences by whom properly puniſhed, whether by the injured State or they into whoſe Territory the offender is fled.*
III. *Whether Kingdoms and States ought to deliver up Fugitives, if required, or not.*
IV. *Where Perſons are fled, the places whither they come, ought to be Aſylums.*
V. *How diſtinguiſhed, and when to be puniſhed or delivered.*
VI. *Whether an innocent Man may be deſerted and delivered up to the enraged Power that demands him.*
VII. *Whether an innocent Perſon may be deſerted and yielded, if War be threatned.*
VIII. *Whether an innocent Perſon refuſed to be delivered up, ought to yield himſelf.*
IX. *If Charity in an innocent to yield himſelf, whether Compulſion may be uſed if he refuſes.*
X. *Whether this of delivering up does extend to Sovereign Princes driven out of their Country.*
XI. *Perſons running away with the Publick Revenue, where their Perſons and Goods have been ſeized till reparation and ſatisfaction be made.*

I. Fathers are not bound for the fault of their Children, nor Maſters for thoſe of their Servants; nor Princes for the Actions of their Subjects, unleſs they become partakers in the Crime; the which may be done in two reſpects, by ſufferance and receipt; therefore if Princes ſhall ſuffer or countenance their Subjects, by Pictures or Libels, or otherwiſe to abuſe another Nation or *Commonwealth*, it is the ſame as if they ſhould authorize it. *Brutus* to *Cicero*, *How can you make me guilty? Yes, well enough, as if it were in you to hinder it*; but receipt may admit of ſome further ſcrutiny.

Zeno interceding for the *Magnets* to *T. Quintus* and the Legates with him beſought them with tears: *ne unius amentiam civitati aſſignarent, ſuo quemq; periculo facere, Liv. l.* 40.

II. *Commonwealths* being inſtituted, it was agreed that Faults of Particulars, which do properly belong to their own Society, ſhould be left to themſelves and their Sovereigns, to be puniſhed or connived at, as they judged moſt fit.

Yet

Yet that *Right* is not ſo abſolutely left to them, but Offences, which tend to the Deſtruction of Society or Government, whereof *Treaſon* is the chiefeſt, may ſeem to be excepted; for if a Subject ſhall commit an Act tending to the Subverſion of his Soveraign's Government, the ſame is an Offence that's ſubject to an *univerſal puniſhment, i. e.* it is to be puniſhed every where; and the Governours into whoſe Territory ſuch fly, ſeem to have a Right of proſecuting for the Offence: In Civil Actions, which tend to Commerce that ſupports Society, the Subjects of foreign Nations having juſtly contracted Debts in their own Country, may obtain Juſtice in another; by a ſtronger Reaſon it is thought, that Princes or Repulicks that have received publick Injuries, have Right to require Puniſhment for the Indignity that is offered them, at leaſt for that which tended to the Subverſion of their Government, and to have the Offenders delivered up.

5 *Jac. in B. R. Roll's* Abridgment, *fol.* 539. *Wyer's* Caſe.

III. The Queſtion is Illuſtrious, Opinions grounded on ſeveral great Precedents have been both ways produced: It hath been generally held, That thoſe Kingdoms where the Offenders are fled, ought to do one of the two, *either puniſh them according to their Deſerts being called upon, or leave them to the Judgment of the offended State*; others on the contrary; moſt certain it is by the *delivering up*, is underſtood, to leave him to the legal Judgment of that Prince or State, whom he hath offended: And ſuch was the Declaration of *Ferdinand* King of *Spain*, who had been often requeſted by *Henry* the Seventh to deliver up *Edmond de la Pool* Earl of *Suffolk* his Subject, then fled for Protection to that Prince's Country, but was always refuſed; but being continually importuned by Promiſes that he ſhould not be put to Death, cauſed the Earl to be deliver'd up to him, who kept him in Priſon, and conſtruing his promiſe *to be perſonal to himſelf*, commanded his Son *Henry* after his Deceaſe to execute him, who in the fifth Year of his Reign in *cold Blood* performed the ſame. But the Malice of that politick Prince the Father, and the uncontroulable Will of the Son are Precedents but of ſmall Force;

For the knowledge of the Cauſe, ought to precede the Dedition; *non decet homines dedere cauſa non cognita* *Plutarch* in his *Romulus*

Attainted by Act of Parliament 12 *H.* 7. *Co. Inſt. fol.* 180.

5 *H* 8 *vide.* Lord *Herbert's* Hiſtory of him out of

H. 8. *Pepin* received, and would not deliver up thoſe that are fled *Neuſtria*, oppreſt by Tyranny. *Fredegar in reb. Pep. An.* 1188.

the Example of which not long after, gave the *French King* occaſion to beware of truſting the latter with a Subject of his on the like occaſion; for *Cardinal Pool* not many Years after, coming Ambaſſador from the *Pope* to the *French* King, they both being then in Amity, and *Henry* the Eighth in League with the latter, but in Enmity with the firſt, requeſted to have the *Cardinal* delivered up, but could not prevail, being doubly armed, as the Ambaſſador of a Sovereign Prince, (for ſuch is the *Pope*) and in the Territory of a foreign State.

The *Iſraelites* required of the *Benjamites* to deliver up the wicked Men; the *Philiſtines Sampſon. Cato* gave his Vote that *Cæſar* ſhould be delivered to the *Germans*, for ſpoiling them without juſt Cauſe. Nor are nocent Perſons injured, if they are either delivered up, or puniſhed; yet does it not thence follow that they muſt be delivered up or puniſhed: The *Romans* delivered up thoſe that had done Violence to the *Carthaginian* Ambaſſadors; yet the Ambaſſadors of the *Abaſſines* having been traiterouſly murthered by one of the Templars at *Jeruſalem*, the Offender being demanded, that ſo Juſtice might be executed on him for the Act, the *Grand Maſter* anſwered, That he had already enjoyned him Penance, and had directed him to be ſent to the *Pope*, but abſolutely refuſed to deliver him up.

Tyrius. lib. 20. *cap* 23. *Anno* 1173.

IV. But then, and as in this laſt, ſo in all other, the Offender muſt have committed ſome publick Offence*, as Treaſon; for moſt certainly it extends not to private Injuries, becauſe there is no Precedent that ever a War was begun for ſuch, though they may contribute much, but for thoſe which tend to the Subverſion or Ruine of a Country, they often have been delivered up; *Jugurtha* of *Bocchus* in *Salluſt*, *So ſhalt thou at once free us from the ſad neceſſity of proſecuting thee for thy Errour, and him for his*

* Yet out of Churches beyond Seas for private Offences, which are univerſal Sanctuaries, the Offenders have been taken: in *Luſitania*, *Ferdinand* Lord Chamberlain was taken by Force out of the Church and burnt, for forcing a Noble Virgin *Mariana lib.* 11. *Charles* Duke of *Burgundy* delivered up to *Lewis* the Eleventh, the Earl of St. *Paul*, Conſtable of *France*, who flying to ſome of his own Cities, obtained Letters of Safe-Conduct to come and commune with the Duke, in order to the making his Peace with the King; but the Duke after he had him in Cuſtody, delivered him to the King of *France*, who immediately after cut off his Head. *Phil. Comines, l.* 4. *c.* 12.

Trea-

Treaſon. And by moſt Writers it is agreed, that ſuch Offenders muſt either be delivered up or puniſhed, the Election is left to their Choice, into whoſe Territory they are fled; though ſome have held, that in caſe of Protection or Sanctuary for ſuch unfortunate Perſons, Princes do make their Countries *Aſylums* †.

† *Ludovicus Pius* the Emperor received thoſe that fled to him from the *Roman Church*, as appears by his Decree, *Anno* 817 and *Luther* himſelf did not want Princes to protect him from the Fury of St. *Peter*'s Chair. *Vide* his *Colloquiums*, Printed in *London*, *Ann.* 1663.

T. Quintus Flaminius ſent Ambaſſadors to *Prusias* King of *Bithynia*, for the procuring the delivering up the brave but unfortunate *Hannibal*, who accordingly being ſeized on, *I will now*, ſays he, *deliver the Romans of that Fear which hath ſo many Years poſſeſt them; that Fear which makes them impatient to attend the Death of an Old Man: This Victory of* Flaminius *over me, who am diſarm'd and betray'd into his Hands, ſhall never be numbred amongſt the reſt of his Heroical Deeds: No, it ſhall make it manifeſt to all the Nations of the World, how far the ancient Roman Virtue is degenerate and corrupted; for ſuch was the Nobleneſs of their Forefathers, as when* Pyrrhus *invaded them in* Italy, *and was ready to give them Battle at their own Doors, they gave him Knowledge of the Treaſon intended againſt him by Poyſon; whereas thoſe of a later Race have employed* Flaminius, *a Man who hath heretofore been of their Conſuls, to practiſe with* Pruſias, *contrary to the Honour of a King, contrary to his Faith given, and contrary to the* Laws of Hoſpitality, *to ſlaughter or deliver up his own Gueſt.* *Vide* Sir *Walter Raleigh*, *lib.* 5. *cap.* 3. §. 2.

V. Though Kingdoms and States are looked upon as places of Refuge; yet that muſt be underſtood for thoſe that are perſecuted with cauſeleſs Hatred, not to ſuch as have committed that which is Injurious to humane Society, or to other Men. *Gilippus* the *Laconian* in *Diodorus Siculus*, ſpeaking of the Right of ſuch miſerable Fugitives, *Lib.* 13. ſaith, *They that introduced theſe Rights at firſt; meant the Unfortunate ſhould expect Mercy, the Injurious Puniſhment* ——— After — *Theſe Men, if by the unjuſt Deſire of that which is another's, they have fallen into theſe Evils, muſt not accuſe Fortune, nor impoſe on themſelves the Name of Supplicants,*

for that by Right belongs to them that have an innocent Mind, and adverſe Fortune.

Carum occidiſti, dum vis ſuccurrere: nullum
Crimen habes; manus eſt ibi purior, ac fuit ante.

But the Life of thoſe Men full of wicked Acts, ſhut up againſt them all Places of Refuge, and leaves no room for Compaſſion. *Cicero* hath a Saying out of *Demoſthenes*: *We muſt ſhew Compaſſion to thoſe whom Fortune, not their own evil Deeds, hath made Miſerable.* And by the holy Law, when any one had been ſlain by an Ax ſlipping out of another's Hand, the Cities of Refuge were open: the moſt holy Altar it ſelf was no Protection for thoſe that had ſlain an innocent Man maliciouſly, or had troubled the Commonwealth; which Law *Philo* explaining, ſaith, *Unholy Men have no Entertainment in the Holy Place.* *Lycurgus* the Orator relates that one *Calliſtratus*, having committed a Capital Fault, and adviſing with the Oracle, received anſwer, *That if he went to* Athens *he ſhould have Right*: and thereupon, in Hopes of Impunity, he fled to the moſt holy Altar there, notwithſtanding which he was taken from thence, and put to Death by the City moſt obſervant of her Religion, and ſo the Oracle was fulfilled. *Princes indeed* (ſaith *Tacitus*) *are like Gods, but neither do the Gods hear the Prayers of Supplicants, unleſs they be juſt.* Such then are either to be puniſhed or delivered up at leaſt; yet ſurely this hath been obſerved to extend only to thoſe Crimes that touch the State, or at leaſt are of a very hainous Nature; ſometimes they are expreſly ſtipulated by Leagues to be delivered up; however this is to be obſerved, that ſuch ſort of Fugitives and Supplicants, be they Foreigners or Subjects, are to be protected till they have been fairly tryed; and if that whereof they are accuſed, be not forbidden by the Law of Nature or Nations, the Cauſe muſt be tryed and adjudged by the Municipal Laws of that Kingdom or State from whence the Crime doth ariſe. From which it may be obſerved, that a Fault committed in *England*, and the Perſon flying, and Requeſt made; yet, by Reaſon that none can by the Laws of that Nation be tryed but *per Pares*, nor then but in Perſon; it will thence follow, that

They of *Holland* lately delivered up the famous poiſoning Cook that had been in the wicked Conſpiracy with the Counteſs of *Soiſſons* in *France*.

that ſuch may ſeem out of the general Rule: However, it may ſtand with the higheſt Reaſon, that the Fact and Proof being remitted over with the Requeſt, there may appear a juſt Ground for the Demand.

VI. Whatever the Opinion of thoſe Writers have been, the Practice of latter Ages hath ſeemed to incline otherwiſe. *Queen Elizabeth* demanded *Morgan* and others of her Subjects fled into *France*, that had committed Treaſon againſt her; the Anſwer of the *French* King was, *Si quid in Gallia machinaretur, Regem ex jure in illos animadverſurum; ſin in Anglia quid machinati fuerint, Regem non poſſe de eiſdem cognoſcere, & ex jure agere; omnia Regna profugis eſſe libera; Regum intereſſe, ut ſui quiſque Regni libertates tueatur, imo Elizabetham non ita pridem, in ſuum Regnum Mountgumerium, Principem Condæum, & alios è Gente Gallica admiſiſſe, &c.* and they were never delivered up: but the like was not returned by the King of *Scotland*, for he promiſed that he would tranſmit *Ferniburſt* and the *Chancellor* too, if they were convicted by a fair Tryal. 34 *Eliz. Camden, fol.* 35. *Vide Camb. Anno* 1585.

Perſeus King of *Macedon*, in his Defence to *Martius*, ſpeaking of thoſe that were ſaid to have conſpired againſt *Eumenes*: *So ſoon as I was admoniſhed by you, and finding the Men in* Macedonia, *I commanded them away, and charged them never to return into my Dominions.* The Cry of the late Royal Martyrs Blood, juſtly procured them of *Holland* to deliver up the *Regicides* to the injured Succeſſor. And from the Crown of *Denmark* it was expreſly ſtipulated they ſhould be delivered in theſe Word: *Item quod ſi qui eorum qui rei ſunt illius nefandi Parricidii in Regem* CAROLUM *Primum beatiſſimæ Memoriæ admiſſi, ac legitimè de eodem ſcelere attincti, condemnati, vel convicti, &c.* 'If any of them who are guilty of the horrid Murder 'committed upon King *CHARLES* the Firſt of Bleſſed 'Memory, be either now in the Dominions of the King 'of *Denmark* and *Norway*, or ſhall hereafter come thither, that as ſoon as it ſhall be known or told to the 'King of *Denmark*, or any of his Officers, they be forthwith apprehended, put in ſafe Cuſtody, and ſent back 'into *England*, or be delivered into the Hands of thoſe 'whom the King of *Great Britain* ſhall order to take 'charge of them, and bring them home.

Liv. lib. 22. *cap.* 37.

Anno 1660.

In the Alliance between thoſe Crowns, *Feb.* 13. 1660. provided for in the fifth Article.

VII. Moſt certain it is, if War be threatned to a Nation or People, if they deliver not up the Offender, though perhaps he is innocent, and that ſuch is the Malice of his Enemies, that they know they will put him to death, yet he may be deſerted eſpecially if that Nation or Kingdom is inferiour to others; but then the ſame ought not to be done raſhly. The *Italian* Foot that forſook the unfortunate *Pompey* before all was loſt, being aſſured of Quarter from the Victorious *Cæſar*, were condemned by moſt that reported the Story of that day.

That politick Princeſs Queen *Elizabeth* gave the *Scots* a more equitable anſwer when they demanded *Bothwell*, ſhe anſwered, that ſhe would either render him up, or ſend him out of *England*. *Cambden Anno* 1593.

Pope *Alexander* (in the mortal Feud between him and the *Emperor Frederick*, who favoured *Octavian* the *Antipope*) fled diſguiſed to *Venice*, the *Duke* and *Senate* being jealous that the *Emperour* would demand him, ſent an Embaſſy to the *Emperour* to endeavour a Mediation and Peace, which was no ſooner offered, but the *Emperour* broke out into a Rage, bidding them go home, ſaying; Tell your 'Prince and People, that *Frederick* the *Roman* Emperour 'demands his Enemy, who is come to them for Succour, 'whom if they ſend not preſently bound hand and foot, 'with a ſure Guard, he will proclaim them Enemies to 'him and the whole *Empire*, and that there is neither Alliance or Laws of Nation which ſhall be able to free them 'from revenge for ſuch an Injury, to proſecute which 'he is reſolved to overturn all Divine and Humane Laws, 'that he will ſuddenly bring his Forces before their City, 'and contrary to their expectation, plant his *Victorious* '*Eagles* on the Market-place of St. *Mark*. This Meſſage been faithfully delivered, the *Senate* decreed *Arms, Arms*; and while they were preparing, News was brought that *Otho*, the Emperour's Son, and General of the *Cæſarean* Fleet, was entred the *Gulph* with ſeventy five Gallies; the moſt valiant and religious *Sebaſtiano Cyani* reſolved to meet him, and having encountred them on the Coaſt of *Iſtria*, defeated *Otho* and all his Naval Forces, taking forty eight Gallies, *Otho* their *Admiral* and the reſt either burnt or deſtroyed; he returned in Triumph for *Venice*, and not long after *Frederick* became convinced, that *Heaven* fights the Battles of the Innocent, and on his knees beg'd pardon of *Alexander* the Fugitive *Pope*.

Hiſt. Reip Ven. In Vita Sebaſtiani Cyani Duke of Venice, An 1164.

Lewis

Lewis the Eleventh of *France* required by Ambaſſadors of *Philip* Duke of *Burgundy*, the delivering up of Sir *Oliver de la Marche* (who being a *Burgundian*, had wrote (as was conceived) ſomewhat againſt the Claim of the *French* to ſeveral Territories) upon a publick Audience at *Liſle* they were anſwered by Duke *Philip*, *That* Oliver *was Steward of his Houſe, a* Burgundian *by birth, and in no reſpect ſubject to the Crown of* France; notwithſtanding if it could be proved that he had ſaid or done any thing againſt the King's *Honour*, he would ſee him puniſhed according as his faults ſhould deſerve.

VIII. But admitting that ſuch an Innocent Perſon ought not to be delivered up, whether he is bound to yield himſelf; by ſome it is conceived he ought not, becauſe the nature of Civil Societies, which every one hath entred into for his own Benefit, doth not require it; from which it follows, that though ſuch Perſons are not bound to that by Right, properly ſo called, yet it doth not follow, but in charity he ſeems bound to do it; for there may be many Offices not of proper Juſtice, but of Love, which are not only performed with praiſes, but alſo cannot be omitted without blame; and ſuch indeed is the Act of ſuch a Perſon's voluntary yielding up himſelf, preferring the Lives of an Inoncent multitude before his own. *Cicero* for *P. Sextus*, *If this had happened to me ſailing with my Friends in ſome Ship, that Pirates ſurrounding us ſhould threaten to ſink us, except they would deliver me, I would rather have caſt my ſelf into the Sea, to preſerve the reſt, than to bring my Friends either to certain Death, or into great danger of their life.* The Requeſt of the Noble *Strafford* is freſh in our Memories.

Idem de finibus 3. Vir bonus & ſapiens, & Legibus parens, & civilis officii non ignarus, utilitati omnium plusquam unius alicujus aut ſua conſulit. And in *Livy* therere is a moſt excellent ſaying of ſome *Moloſſians*: *Equidem pro Patria qui lethum oppetiſſent ſæpe fando audivi; qui patriam pro ſe perire æquum cenſerent, hi primi ſunt. Liv. lib.* 45.

IX. But whether ſuch an Innocent Perſon may be compelled to do that which perhaps he is bound to do, may be a queſtion, rich Men are bound by the precept of Mercy to give Alms to the Poor, yet cannot be compell'd to give: it is one thing when the parts are compared among themſelves, another when Superiours are compa-

red to their Subjects, for an Equal cannot compel his Equal, but unto that which is due by right ſtrictly taken; yet may a Superiour compel his Inferiour to things which Vertue commands; in a Famine to bring out Proviſions they have ſtored up, to yield him * to Death that deſerts his Colours, or turns Coward, to mulct thoſe that wear exceſſive Apparel †, and the like. *Phocion*, pointing to his dear Friend *Nicocles*, ſaid, *Things were come to that extremity, that if* Alexander *ſhould demand him, he ſhould think he were to be delivered up.* It hath ſeemed that ſuch an Innocent Perſon might be deſerted and compelled to do that which Charity requires; but the late ROYAL MARTYR ſeemed of another Opinion, when he came to dye, in the Caſe of the *Britiſh Protomartyr* Strafford.

* *Leg Deſert.* † *Coke Inſtit.* 3. *fol* 199. *Plutarch Phocion.* *Fides agi viſa deditos non prodi* Liv. l. 7. *Satius judicemus eſſe paucos aliquos mala ferre, quam immenſam multitudinem.*

* The Son of *Pompey* was ſo worthy a Son of ſo great a Father, that he contended with *Anthony* and *Auguſtus* about the *Empire of the World*; this *Pompey* entertaining *Anthony* and *Auguſtus* in his Galley, the Captain which commanded it, demanded leave of him to weigh Anchor and to carry away his Gueſts, and to make his Rivals Priſoners: he anſwered him, that he ought to have done it without telling him of it, and ſhould have made him great without having made him forſworn: certainly an honeſt Perſon will never be of the Mind of this Captain: therefore in ſuch extremities *Counſellors*, either for high advantages, or in the great neceſſities of their *Prince* ſhould ſerve their Maſters with their Eſtates and Goods, but not with their Honour and Conſcience.

X. But this delivering up does in no reſpect extend to Soveraign Princes, who are by Divine permiſſion unfortunately driven out of their own Country; and therefore memorable is the great Treaty commonly called by the *Flemings*, *Intercurſus Magnus*, where there was an expreſs Article againſt the reception of the Rebels either of *Henry* VII. or of the *Arch-Duke* of *Burgundy* by others, purporting that if any ſuch Rebel ſhould be required by the Prince, whoſe Rebel he was, of the Prince Confederate, that forthwith the Prince Confederate ſhould by Proclamation command him to avoid the Country, which if he did not within fifteen days, the Rebel was to ſtand proſcrib'd and put out of Protection. But a Prince, or one that hath a Sovereign Power; and had been contending for his Right, but Succeſs not crowning his hopes, occaſioned his flight, hath always been excepted; to deliver up ſuch, is even againſt Nature and the Majeſty of Power; and therefore it is very remarkable what attempts were made for *E.* 4. *H.* 7. nay in the very Treaty of

12 *H.* 7. Lord *Bacon's* Hiſtory of *Henry* the Seventh, *fol.* 162.

of *Intercurſus magnus* it is memorable that at that time *Perkin Warbeck* was contending with *H.* 7. for the Crown of *England* by the name of *Richard* Duke of *York*'s younger Son and ſurviving Heir Male of *Edward* the Fourth. My Lord *Bacon* does take a particular notice, that *Perkin Warbeck* in that very Treaty was not named nor contained, becauſe he was no Rebel, but one that contended for the Title. Afterwards when *Perkin* was fled into *Scotland*, and there received by the *Scottiſh* King, *Henry* the Seventh ſent to have *Perkin* delivered up, and it was one of the principal Inducements of the King to accept of a Peace upon that condition, giving for an argument, that *Perkin* was a Reproach to all Kings, and a Perſon not protected by the Laws of Nations; but the *Scotch* King peremptorily denied ſo to do, ſaying, *That he (for his part) was no competent Judge of* Perkin's *Title, but that he had received him as a Suppliant, protected him as a Perſon fled for refuge, eſpouſed him with his Kinſwoman, and aided him with Arms, upon the belief he was a Prince, and therefore he could not now with his Honour ſo unrip, and (in a ſort) put a lye upon all that he had ſaid and done before, as to deliver him up to his Enemies.* This was ſo peremptorily inſiſted on by the *Scotch* King, that *Henry* the Seventh was at length contented to wave the Demand, and conclude a Peace without that Article; notwithſtanding the King of *Scotland* had often in private declared, that he ſuſpected *Perkin* for a Counterfeit. What Endeavours were uſed by the late *Uſurper* with thoſe of *Holland* and with Cardinal *Mazarine* concerning his preſent Majeſty, and how his Royal Perſon and Brothers were after the Murder of their bleſſed Father like Partridges hunted from place to place, the World and the ſhameful Stories of that Age can too well evince. But on the other hand, as we have ſaid, thoſe that have committed Offences that ſtrike directly at Government and the Murder of their reſpective Princes, have found but cold Harbour in the Territories of Foreign Princes; however in Caſes of like nature Princes have often ſtipulated with each other for the delivering up Offenders of that magnitude as hath been already mentioned.

Lord *Bacon*'s Hiſtory of *Henry* the Seventh, *fol.* 176.

XI. Perſons that have wronged or defrauded Kings of their Revenue, eſpecially in *England*, upon Letters of

Requeſt to thoſe Princes whither they have fled, have been delivered up.

Some *Florentine* Merchants of the Society of the *Friſcobaldi*, being made Collectors and Receivers of the King's Cuſtoms and Rents in *England*, *Wales*, *Ireland*, and *Gaſcoigne*, running away with thoſe Monies, together with all their Eſtates and Goods for *Rome*, the King ſent his Letters of Requeſt to the *Pope*, deſiring that they might be arreſted, and their Perſons and Goods ſeized, and ſent over to ſatisfie him for the damages he and his Subjects had ſuſtained by them, promiſing not to proceed againſt them to the loſs of their Limbs or Lives. Upon which Letters, the *Pope* ſeized on their Goods, and not long after the King Writ for the ſeizing of their Perſons, for anſwering of other frauds and injuries.

Rott. Roma An. 4 E. 2. M. 17. Dorſo.

Rott. Roma 4 E. 2 M. 16. Dorſo.

The like was done for one *Anthony Fazons*, who had received 500 *l.* of the King's Monies, and running away with it to *Lorraine*, the King writ to the ſame *Duke*, deſiring that ſearch might be made, and his Perſon ſeized upon, and his Goods ſecured in every place within his Territories, till he ſhould ſatisfie the ſaid 500 *l.*

Clauſ. 8 E. 2. M. 31. Dorſo pro Rege.

CHAP.

Chap. XII.

Of Contribution paid by Places Neuter to both Armies in War.

I. *Of force uſed to Neuters whether lawful.*
II. *Of Neuters, their duty conſider'd in reference to either of the Warring parties.*
III. *Conſiderations general touching the ſame, and the chief matters that are objected by thoſe that ſcruple thereat.*
IV. *The Caſe ſtated generally in the queſtion propounded to our* Saviour *of paying tribute to* Cæſar.
V. *In the payment of Contribution to an Enemy, what is neceſſary to be diſtinguiſhed in the beginning of a War.*
VI. *Of a ſecond diſtinguiſhment drawn out of the firſt, of ſuch payments, when a War is actually formed.*
VII. *Where a man pays, but miſlikes the cauſe, whether excuſable, the War not yet actually formed in place.*
VIII. *Where a Country is fully poſſeſt, whether payment then is lawful.*
IX. *Of the ſtate of thoſe that live on Frontiers, their condition conſidered in reference to procure their peace by Contribution.*
X. *Of interdiction by him to places from whom faith is owing, Contribution notwithſtanding being paid, whether the ſame creates an offence in them.*
XI. *Of the genuine conſtruction of ſuch interdictions according to the true intention of the ſame.*
XII. *Of the impunity and puniſhment that ſuch innocent Offenders may be ſubjected to, in caſe of being queſtioned for the contempt by their right Governours.*

I. It is manifeſt there is no Right of War over Neuters in War; yet becauſe by occaſion of the War many things are uſually done againſt ſuch (Borderers eſpecially) on pretence of neceſſity, there can be no Excuſe for the act, unleſs it be apparent Neceſſity, and that the ſame ought to be extreme, for then it may give a Right over what belongs to another Man; for in ſuch caſe, if the neceſſity be manifeſt, there may be ſuch a proportion exacted as the neceſſity requires, that is, if the Cuſtody ſuffices, the Uſe of the thing is not to be taken; if the Uſe, not the Abuſe, be neceſſary, yet is the Price of the thing to be reſtored. *Moſes*, when the higheſt neceſſity urged him and the People to paſs through the Land of the *Idumeans*, firſt he ſaith, *he would paſs along the high-*

way,

* See to this purpoſe his excellent Speech to his Soldiers near Sicily, when he marched into Africk, and the Narration of his March thorow Africk. Vandal. 1.

way, and not divert into their Corn-fields or Vineyards; if he had need but of their Water, he would pay a price for it. The worthy Captains, both *Greek* and *Roman*, have done the like: In *Xenophon* the *Greeks* with *Clearchus*, promiſe the *Perſians* to march away without any damage to the Country, and if they might have neceſſaries for Money, they would take nothing by force. This Vertue is often commended in * *Beliſarius* by *Procopius* his Companion and Witneſs of his Actions.

Exemplum nobile vide apud Parutam, lib. 8. Thucydides l. 1.

II. And as the Law doth preſerve the Eſtates and Territories of ſuch Neuters, or thoſe that abſtain from War, ſo on the other hand ſuch ought to do nothing for either Party, but eſpecially for him who maintains a bad Cauſe, or whereby the Motions of him who wageth a juſt War may be retarded; and in a doubtful Caſe they ought to ſhew themſelves equal (as we have mentioned elſewhere) to both in permitting paſſage, in affording Proviſion for the Legions or Navies, and in not relieving the Beſieged. *It is the duty of the* Athenians, *if they would not ſide with any Party, either to prohibit the* Corinthians *from raiſing Souldiers out of* Attica, *or permit them to do the like.* So the Emperor and Confederate Princes of the Empire, with the Cantons of *Switzerland* in the late *German* War, and ſo of the King of *England*, who was ſo careful to preſerve the Neutrality, that he iſſued forth his Proclamations to prohibit all Perſons, of what Condition ſoever, to become Soldiers in the Service of any of the warring Princes. It was objected by the *Romans* againſt *Philip* King of the *Macedonians*, That the League was violated by him two ways, *both becauſe he did injuries to the Fellows of the Roman People, and becauſe he aſſiſted the Enemy with Aids and Money.* The ſame things are urged by *Titus Quintus* in his Conference with *Nabis*, Yet thou ſayeſt, *I have not violated you, nor your Friendſhip and Society*, how often ſhall I prove the contrary? In ſhort, wherein is Friendſhip violated? by theſe two things eſpecially: *If thou haſt my Friends for Enemies: if thou art a Friend to my Enemies: he is reckoned an Enemy who ſupplieth them with what is uſeful for the War.*

Procop. Goth. 1.

III. But now there are many things that are uſeful for the War worthy of ſome conſideration, the which are not ſo accounted at this day by the Laws of Nations; underſtand me, That I call the *Laws of Nations*, which is

at this day univerſally practiſed, as namely the ſupplying either or both of the warring Parties with Monies, or that which is called *Contribution*. Now if the Minds of the Subjects cannot be ſatisfied by the declaration of the Cauſe, it will certainly be the Office of a good Prince or General rather to impoſe upon them Contribution than Military Service, eſpecially when that Prince or General hath an Army ſufficient to proſecute his Deſigns, the which a juſt Commander may uſe as God doth the ready Service of the Devil. *Sil. in Verb. bellum p. 1. n. 7. circa finem.*

The moſt excellent *Grotius* having moſt incomparably treated on, and cleared all the important Objections againſt a juſt War, together with the Incidents of the ſame; yet this main one of *Contribution* or paying to both Armies, whether lawful, he hath not touched in any other words but theſe, *Quod ſub tributo utrique parti præſtando factum diu in Belgico, Germanico bello nuper vidimus, eſtque id conſentaneum mori veteri Indorum* †: and ſo cites a ſaying in *Diodorus Siculus**, of the Peace that thoſe People maintained in their Poſſeſſions by reaſon of ſuch Contributions. But to many Perſons this Inſtance without further ſcrutiny, proves inſufficient; for there are many, who not finding this Liberty in their Conſciences, unneceſſarily chuſe rather to give up their Bodies to reſtraint, and to abandon their whole means of Subſiſtence in this World, both for themſelves and their Children, (which ought not fondly to be done, *unleſs we would be worſe than Infidels*, as S. *Paul* ſaith) they ground their Reſolution on this Reaſon, that they know not whether the Monies they give may not furniſh to the Deſtruction of many Innocents, and perhaps the juſt Magiſtrate; yea, and the total ſubverſion and ruine of their Country, Liberty and Religion: and therefore though Men give and beſtow their own where they pleaſe, yet in ſuch Caſes they may not; therefore it may not be impertinent to examine whether theſe be neceſſary Scruples in themſelves, and ſuch as admit of no exception of Liberty, or whether thoſe Scruples be reaſonable, or indeed meer ſcandal.

† *Grot. de Jure Bell. ac Pacis, lib. 3. cap. 12. §. 4. n. 2.*
* *Lib. 2.*

IV. The *Scribes* and *Phariſees* ſought two ways to entrap *Our Saviour*; one was if he had blaſphemouſly taught a new Religion, and a new *God*, (*viz.* himſelf) they

they hoped the People would be provoked to ſtone him for this, according to the *Hebrew Law*: The other was, to bring him within the compaſs of *Treaſon*, as if he could not lead great Multitudes after him without traiterous deſigns; but this Gin fail'd too, becauſe the Multitudes which followed him were always ready to defend him. However, when he was at *Jeruſalem*, where the *Roman* Troops and *Prætor* were, they thought they had him ſure, by propounding this Subject to him:

Deut. 13.

Is it lawful to pay Tribute to Cæſar? which was as much as to ſay, We who are deſcended from *Abraham*, and are the peculiar People, to whom God hath given the large Privileges of the Earth at home, to bath our ſelves in Rivers of Milk and Honey, to have full Barns and many Children; yea, that GOD himſelf would be adored in no other place of the World but at this our *Jeruſalem*, and that abroad we ſhould triumph over the *Barbarous* and uncircumciſed World by virtue of that *Militia*, which he never ordered for any but our ſelves; how are we then in Duty or Conſcience to ſubmit now to the Ordinances of the *Uncircumciſed Romans*? Or what Right can he have to exerciſe ſupreme Juriſdiction over us, the privileged *Seed of* Abraham, by levying of Taxes on our Eſtates and Lands, which GOD himſelf laid out for us, by which means the *Emperor* and *Senate* hold this very Temple in ſlavery, and inſult over our very Conſciences and Religion, by defiling our very Sacrifices with the mixture of impure Blood; which as they are the price of our Blood, and a Tribute far above *Cæſar*'s, (payable in no other Place but this Temple, which GOD himſelf built) ſo our Blood ought not to ſeem too dear to be ſacrificed for the Liberty of theſe: and though the *Roman State* could pretend, yet what can this *Cæſar* pretend? Every man's Conſcience knows that it was but the other day he uſurpt over the *Senate*, in which reſides the true Juriſdiction of *Rome*; and if that were otherwiſe, yet how can he pretend to a Title unleſs Poyſon be a Pedigree, or violent Uſurpation a juſt Election, by which he who is but the greateſt Thief in the World would now paſs for the moſt Soveraign and Legitimate Prince? How then are we in Conſcience obliged to pay Tribute to this *Cæſar*? Though thoſe Lawyers thought in their Conſciences that they were not to

pay

pay it, and that *Our Saviour* likewiſe, as a *Jew*, thought ſo too; yet they ſuppoſed he durſt not ſay ſo much in the crowd; nor yet deny it by ſhifting it off with Silence, leſt the *Roman* Officers ſhould apprehend him: But when *Our Saviour* ſhewed them *Cæſar*'s Face upon the Coyn, and bade them *Render to Cæſar that which was Cæſar*'s, *and to GOD that which was GOD's*; His anſwer ran quite otherwiſe, not as ſome would have it, that by a Subtilty he anſwered not to the Point propoſed, for then the ſenſe of the whole Text would ſound very ill in ſuch Terms, *viz.* If there be any thing due to *Cæſar*, pay him it, and if any thing is due from you to GOD, then pay it likewiſe; This had been a weakening of GOD's Right for *Cæſar*'s, and to have left a deſperate doubting in a neceſſity: 'Tis beyond all cavil that *Our Saviour's* Opinion was poſitive for paying of *Tribute* to that *Cæſar*, becauſe *de facto* he did pay *it*; and the plain Reaſon of it appears evidently in this his Anſwer: *Cæſar*'s Face was upon the Coyn, that is to ſay, *Cæſar* by Conqueſt was in Poſſeſſion of that Coyn, by poſſeſſing the place where he obliged them to take it; Coyning of Money being one Prerogative of Soveraign Power. Mat, 22. 22. *Coke* 3. *Inſtit. fol.* 16, 17.

V. But to come more cloſe to the Queſtion, whether Contribution may lawfully be paid: Firſt, we are to make a Difference betwixt *perferre & inferre bellum*; the one is active, and properly at the beginning of a War, and in a place where yet no War is, and where its Cauſe only, and not its Effects can be conſidered; in this caſe every thing ought to be very clear for Warrant of a Man's Conſcience, becauſe of the Calamities which he helps to introduce, and is in ſome manner the Author of: the other is paſſive, and there where War, or the Power of War is actually formed, which is the Caſe of this Diſcourſe.

VI. Secondly, we are to diſtinguiſh betwixt that which cannot be had, nor the Value of it, unleſs we actually give it, and that which may be taken by the Law of War whether we contribute or no.

VII. Moſt certain it is, though a War be not yet actually formed in a place, yet a ſcrupling Conſcience, which likes not the Cauſe, may be excus'd in contributing to it in this one Caſe, *viz.* if ſome number of Men, able to take what they ask, demand (with an armed power) the payment

ment of a certain ſum to be imployed in War, then in ſuch a caſe, the Man, whom we ſuppoſe, may pay it, as a Ranſom for his life, or give it as a Man doth his Purſe, when he is ſurpriſed in the High-way, becauſe to this Man it is as much as if the whole Country were poſſeſs'd with an Armed Power. So ſeveral *Dutchies* and *Seigniories* dependent on the *Empire*, do in the preſent War between them and the Crown of *France*, pay Contribution at this day.

4 H. 4. 2.

Procopius in the third of *Goth.* of *Totilas* when he beſieged *Rome*, ſaith, *Agricolis interim per omnem Italiam nihil mali intulit; ſed juſſit eos ita, ut ſoliti erant, terram perpetuo ſecuros colere, modo ut ipſi* Tributa *perferrent*: This, ſaith *Caſſiodore*, is the greateſt praiſe. 12. 15.

But if the Perſon or Country be not for the time in full Poſſeſſion of him whoſe Cauſe he ſcruples at, and that he or they have not a probable fear of extreme danger, nor as probable aſſurance, that without his help the thing demanded nor its value can be taken from him or them, then there is little Excuſe remains for the Act, becauſe the very Act (which his Conſcience diſlikes) participates more of Action than of Paſſion.

VIII. But where a Man or City is fully poſſeſs'd by an invading Power (be the ſame juſt or unjuſt) from whom he or they cannot fly, nor remove their Subſtance, moſt certain the payment of Contribution is no gift any more than he (as above) who with his own Hands being ſet upon by Pirates or Robbers, puts his Purſe into their Hands; for the Laws calls not that a *Gift*, nor excuſes the Party from taking it: And altho' the Parties may imploy the ſame to the Deſtruction perhaps of Innocents, and the like; yet that is an Action out of their Power that give, as far as Winds and Tempeſts are, to which two, as we contribute nothing, ſo we cannot be ſcrupulous in our Conſciencies concerning their bad Effects; nor is the ſame repugnant to the *Canon Law*, (which teaches us humanity, and the imitation of all their vertues) and therefore Perſons, whoſe Lives are innocent and harmleſs, ought not to be ſubjected to danger or plunder, which hardly can be avoided without Contribution or Tribute.

44 E. 3. 14. 4 H. 5. 3. Coke 3 *Inſtit.* fol. 68.

C. 2. *de Treug. & Pace. Nic. Damaſc.*

IX. Again,

IX. Again, thoſe that live on Frontiers, whoſe condition is more ticklish and deplorable, becauſe they are not fully poſſeſt nor taken into the Line of either Party, theſe live as it were in the Suburbs of a Kingdom, and enjoy not the Security or Privileges of others, yet ſuch Perſons may lawfully contribute to both; for though they be but partly poſſeſt by one, and partly by the other, in reſpect of their ſudden abandoning them, yet both Parties have the Power of deſtroying them wholly; wherefore thoſe former Reaſons which juſtifie thoſe fully poſſeſt, do alſo acquit the Payments of theſe; for their condition here is more calamitous, ſeeing they are really but Tenants at Will, expos'd to a perpetual Alarm, and that both Parties wound one the other only through their ſides, as thoſe this day that are ſituate between *France* and *Germany*; for being perhaps Neuters in the War, they are in that caſe by the Law of Arms to ſhew themſelves equal to both, in permitting of Paſſage, in affording Proviſions for the Armies, and in not relieving the Beſieged.

The quiet of the World cannot be had without Arms, no Arms without Soldiers Pay, nor Pay without Contribution. *Tacit. Hiſt.* 4.

Exemplum nobile vide apud Parutam, lib. 8. *Grot. l.* 3. *c.* 17.

X. Nor can the Interdiction of him to whom ſuch owe Faith and Obedience, any ways create the ſame an Offence, ſince the declared Wills of our Governours cannot make all thoſe of our Acts Sins, when we obey or ſubmit to that Power, which againſt our Wills (as much as againſt theirs, and it may be with more of our Miſery) hath diveſted them of the Power of their Rights, and deprived us of the Power of their Government; and by the Laws of War, they who have overcome, ſhould govern thoſe whom they have overcome; and therefore whatſoever is exacted by the Conquerors, may juſtly be paid by the Conquered.

Grot. de Jure Belli ac Pacis, l. 3. *c.* 8. §. 11. *c.* 12. §. 4.

And ſince Princes by their Commands cannot change the nature of human Condition, which is ſubject naturally to thoſe fore-mentioned Changes, it would ſeem exceeding hard to oblige us to almoſt moral Impoſſibilities; and though thoſe Political Commands were as Laws, yet doubtleſs they ought not to be obliging, but according to the Legiſlative Rule, which is *cum ſenſu humanæ imbecillitatis*, this is that which is called the preſumptuous Will * of a Governour, or the Mind of a Law: for in extream neceſſity it is to be preſumed, that both their

Jure hoc evenit ut quod quiſque ob tutelam corporis ſui, jure feciſſe exiſtimetur.

* *Leg. ut vim. D. de juſt. & jur.*

Wills proceeding from the Rigour of what they have declared, rather than by holding to that which is their ſuppoſed Right, introduce certain Miſeries and Confuſion without receiving any Benefit thereby to themſelves. Nor could they of *Utrecht*, and others of the conquered Cities in *Holland*, abandoned afterwards by the *French*, and entirely preſerved from Deſtruction, be condemned by their *Confederates*, for the Sums by them promiſed to the Enemy for the Preſervation of the ſame.

Neither *are ſuch Commands or Interdictions without their ſenſe and profit, though they be not poſitively obeyed*; for thereby Governours ſhew to all the World, that they renounce no part of their Right, no, though it be there where they cannot exerciſe any part of their juſt Power.

And that is apparently evinced by the Laws of Leagues; for ſuch being made, the ſame remains, although the ſame King or his Succeſſor be driven out of his Kingdom, for the Right of the Kingdom remains, although he hath loſt the Poſſeſſion. *Grotius de Jure Belli ac Pacis, lib.* 2. *cap.* 17. §. 19.

XI. Now the true Intention of ſuch Commands or Interdictions is, that the Enemy ſhould not by any means be aſſiſted or ſtrengthened; but if ſuch Prohibitions ſhould be obeyed, nay at ſuch a time, when they and all their ſubſtance are abſolutely poſſeſt by the Enemy, moſt certain ſuch Commands daſh againſt themſelves, and the one countermands the other; for if they refuſe to ſubmit in ſuch a caſe, then they do that which advantages their Enemies, becauſe at that time they will take all, whereas in Caſe of Submiſſion they ask but a part.

XII. In all Wars there are always ſome, by whoſe Diſaffections Enemies gain more than by their Compliance, juſt as Phyſicians do by Diſtempers.

And although, by after variety of Succeſſes, the juſt Governour ſhould recover that place, which ſo ſubmitted to the Power of their Enemies, and for that reaſon ſhould puniſh thoſe that were pliable to extream Neceſſity; yet it follows not upon that, that they who ſo conformed, ſinned, or did that which was abſolutely unlawful; for we well know that reaſon of State often calls for Sacrifices where there is no fault to expiate: *Oſtraciſm* and *Jealouſy*

louſy make away thoſe who are known to deſerve moſt; but in ſtrict Right (which is the Term of this Queſtion) the juſt Governour ought to look upon them as more Unfortunate than Faulty. *In Republica idem eſt nimium, & nihil mereri.*

CHAP. XIII.

Of the Naval Military part.

I. *The Advantage that Princes have by a good Commander.*

II. *The Love that naturally proceeds from the Mariners to thoſe that are valiant and generous.*

III. *Princes in prudence ought not to liſten too much to the Complaints againſt Commanders.*

IV. *Of the faults generally conſidered in Soldiers and Mariners.*

V. *Of the puniſhments that generally wait on ſuch Offenders.*

VI. *Of Drunkenneſs, Swearing, and other ſuch ſort of Impieties, not to be ſuffered in Fleets.*

VII. *Spies, 'tis lawful to uſe them by the Laws of Nations but being deprehended, are to ſuffer Death; and how they are to be dealt withal by the Laws of* England.

VIII. *It is not lawful for a Friend or Neuter to relieve an Enemy, and Perſons ſo offending, how puniſhe.*

IX. *Ships taken as Prize, the Ship, Papers, and other matters concerning the ſame, are to be preſerved.*

X. *Of things taken and acquired in War; how the Right of them becomes veſted in the Captors, and how that is to be underſtood by the Law of Arms.*

XI. *To ſteal the Cables or other Furniture of the King of* England's *Ships, how puniſhable at this day.*

XII. *Ships ſurrendred or voluntarily yielded, how to be dealt with, and to thoſe that ſhall reſiſt, if entred by force, whether quarter may be refuſed.*

XIII. *Ships of War generally ought not to be yielded; but if entred or diſabled, whether they may not accept of Quarter, ſtanding with the Oath called* Sacramentum Militare.

XIV. *Of obeying Orders, the ſame ought punctually to be followed; and if broken, though the act ſucceeds well, whether the ſame ſubjects not the Actor to puniſhment.*

XV. *Of the Obligation incumbent on Commanders and Soldiers, to behave themſelves valiantly, and the right of ſlaying an Enemy, where lawful.*

XVI. *Ships how obliged by the Law of Arms to the Aſſiſtance of one another; and of the duty of thoſe that have Fleets under their Convoy.*

XVII. *An Enemy beaten ought to be purſued, and how far it is lawful to ſlay ſuch flying with their lives in their hands, by the Law of Arms, and how the reeking ſword ought to be governed.*

XVIII. *Perſons exempted from the ſword by the Laws of Nature, Nations, Civil and Canon, and by the Municipal Laws of ſome Countries.*

XIX. *Mutinying how eſteemed, valued and puniſhed at this Day by the practice of Armies, and by the Laws of* England.
XX. *Whether it be lawful to decoy the Subjects, Soldiers, or Mariners of an Enemy to forſake his Prince or General, and to bring over his Men, Ships or Arms, and where by Law they may be received; and how ſuch Deſerters may be puniſhed by the Laws of Nations and of* England.
XXI. *Of Seducers, Meſſage-carriers and Decoyers of Soldiers, how to be handled by the Law of Arms.*
XXII. *Of thoſe that ſhall diſobey or ſtrike their ſuperior Officers, how puniſhable.*
XXIII. *Of mutinying, and thoſe that ſhall act in the ſame, how puniſhed, though they have a juſt Cauſe of Complaint.*
XXIV. *Of the Care incumbent on Commanders and Maſters of the Great Ships, in reference to their ſafety, and the puniſhment of wilful burning and deſtroying them.*
XXV. *Of the general offences at Sea, how puniſhed.*
XXVI. Court Marſhals *how erected, and what Operation their Judgments have, and upon whom.*
XXVII. *Judges and Advocates Power in reference to give an Oath, and the* Admiral's *power how limited in the puniſhing of Offences.*
XXVIII. *Of maimed Soldiers and Mariners, and the Proviſions that the Laws makes for them at this day.*
XXIX. *Of* Triumphs.

I. AN excellent *General* is an Evidence of the Fortune of a *Prince*, and the Inſtrument that occaſions the Happineſs of a Kingdom; and therefore when God makes choice of a Perſon to repair the Diſorders of the World, or the Good of a particular State, then is his Care ſhewed in the furniſhing him with neceſſary Principles to undertake great Matters; the Thoughts are put in his Soul by that Eternal Commander to execute, he troubles and confounds his Enemies, and leads him as by the Hand to Victories and Triumphs: And one of the greateſt Expedients whereof he ſerves himſelf for this Purpoſe, is to raiſe unto him excellent Men, both in Courage and Conduct, to whom he communicates his Care, and who help him to bear the Weight of Affairs. *Alexander* had never conquered *Aſia*, or made the *Indies* to tremble, but for *Ephestion*, *Parmenio*, and *Clitus*; *Cæſar* gained many a Battel by his Lieutenants; and the faireſt *Empire* of the World, which Ambition and the Evil of the times had divided into three Parts, was reduced under the Dominion of *Auguſtus* by the Valour of *Agrippa*; *Juſtinian* triumphed over *Perſia*, and deſtroyed the *Vandals* in *Africa*, and the *Goths* in *Italy* by the Aid of *Beliſarius* and *Narſes*: And it is moſt certain, that *Noble Commanders* are the Glory

Glory of their *Princes*, and Happineſs of the *People*; on the other Hand, Baſe, Cowardly and Treacherous Generals are the Shame of the one, and the Deſpair of the other.

II. Hence it is, that Soldiers and Mariners draw their Lines of Love even to the Mouths of Cannons with a good General, but Mutiny and Hate to the main Yard end againſt one that is Bad; for to obey them who are not their Sovereigns when they do them Hurt, when they inſult and are cruel in cold Blood, and Baſe, Cowardly or Treacherous in Battle, is a ſad Neceſſity for them, and a hard Eſſay of Patience; yet muſt they be obeyed, and the Soldiers and Mariners muſt not rebel or repine, but ſubmit till their Sovereign Redreſſes their Misfortunes.

III. Again, *Princes* ought not to liſten too much to the mutinous Demands of the *Crew*, or any others whoſe Ambition watches their Ruin, whereby to conceive Anger againſt their *Commanders*; for it is eaſier to purge out the Choler and Diſcontent that is got under the Hatches, than to provide *Commanders of Conduct*, Courage, and Faithfulneſs to govern their Expeditions. *Beliſarius*, that moſt excellent Commander, who had no other Crime than his *Reputation*, and was not culpable, but that he was Powerful, having conquered *Perſia*, ſubdued *Africa*, humbled the *Goths* in *Italy*, led Kings in Triumph, and made appear to *Conſtantinople* ſome what of *Old Rome*; an *Idea* of the ancient Splendor of that proud *Republick*; after all his eminent Services, this *great Perſon* is abandoned to *Envy*: A Suſpicion ill grounded, deſtroys the Value of ſo many Services; and a ſimple *Jealouſie of State*, wipes them out of the Memory of his Prince: but he reſts not there, for the Demeanour had been too gentle, if Cruelty had not been added to Ingratitude; they deprive him of all his Honours, they rob him of all his Fortune, they take from him the Uſe of the Day and Light, *they put out his Eyes*, and reduce him to the Company of Rogues, and the miſerable *Beliſarius* demands a Charity; even that *Beliſarius* the chiefeſt General of his Age, and the *greateſt Ornament of the Empire*, who after ſo many Victories and Conqueſts, accompanied with ſo high

Procopius Hiſt. Vandal. in Vita Beliſarii.

Vide Sir *Walter Raleigh. l.* 5. *c.* 6. §. 2. And in that whole Paragraph the Ingratitude that hath been ſhewn by Princes to many Brave and Noble Generals and Commanders, there particularly enumerated.

high and clear a Vertue, and in the midſt of *Chriſtendom*, was reduc'd to ſo abject and low a Miſery.

Nor was this cruel and haſty reckoning of *Juſtinian* let ſlip without a cruel Payment; for *Narcete*, who was as well a Succeſſor in Merit as in Authority to *Beliſarius*, having notice of a diſdain, conceived likewiſe againſt him upon a ſingle Complaint, reſolved not to expoſe himſelf as a Sacrifice to their Malice; and therefore thinking it better to ſhake off the yoke, than ſtay to be oppreſſed, ſoon ſpoiled the Affairs of *Juſtinian*, for the *Goths* revolted, and Fortune would not forbear to be of the Party which *Narcete* followed, nor to find the *Barbarian* where ſo brave a Captain was ingaged. Therefore not one or many Faults are to be liſtened to againſt Commanders, but patiently heard and redreſſed, not to diſgrace or loſe them; for ſuch having committed a Fault, yet being admoniſhed by love, may endeavour by future Services to make recompence by ſome noble Exploit; but diſgraced, become Inſtruments often of Danger and Ruin to their Superiours.

IV. Soldiers and Mariners Faults are either proper to themſelves, or common with others.

Thoſe are common with others which other Men fall into, and are corrected with like ordinary Proceedings as other Crimes of like Nature, as Man-ſlaughter, Theft, Adultery, and ſuch like.

Thoſe are proper which do purely appertain to the *Naval Military* part, and are puniſhed by ſome unuſual or extraordinary Puniſhment: As are theſe; Not to appear at the over muſters or calling over the Ship, to ſerve under him he ought not to ſerve, to vage or wander long from on Ship-board, altho' he return of his own accord, to forſake his Fleet, Squadron, Ship, Captain, Commander, or Officer, to leave his ſtanding to fly over to the Enemy, to betray the Fleet, Squadron, or Ship, to be diſobedient to his ſuperiour Officers, to loſe or ſell his Arms, or to ſteal another Man's, to be negligent in his Officer's Command, or in his Watch, to make a Mutiny, to fly firſt out of the Battel, and the like, which are very frequently ſet forth in the Titles of the *Digeſt* and *Code* of Military Affairs, and other like Titles which accompany them.

§. De re milit. De caſtrenſi peculio, & C. eodem tit. l. 12. C. de erogatione militaris annona & C de veſt Militari.

Arrian,

Arrian, who wrote the Life of *Alexander the Great*, obſerves, *Every thing is counted an Offence in a Soldier, which is done contrary to the common Diſcipline*, as to be neglectful, ſtubborn, and ſlothful.

V. The Puniſhment wherewith Soldiers and Mariners are corrected, are thoſe corporal Puniſhments, or a pecuniary Mulct or injunction of ſome Service to be done, or a motion and removing out of their Places, and ſending them away with ſhame.

By capital Puniſhment is underſtood for the moſt part Death, or at leaſt beating with *Cat with Nine Tails*, as they commonly term it, *Ducking*, *Wooden-Horſe*, *Gauntlet*, and ſuch like, unleſs happily it be pardoned, either for the unskilfulneſs of the Mariner or Soldier, or the Mutiny of the Crew or Company, being thereto drawn by Wine, Wantonneſs, or for the Commiſeration or Pity of the Wife and Children of the Party offending; all which is left to the Diſcretion of the *Lord Admiral*, and others the Supream Commanders or Captains.

VI. It is neceſſary that in Armies and Fleets, all manner of Impiety ſhould be prohibited, eſpecially that of Swearing and Curſing; for ſuch Sins are ſo fooliſh, that they unawares trip Men into Damnation, rendring Men worſe than Beaſts, by how much the more they court that Vanity of Sin, without any of the appendant Allurements which other vicious Actions are accompanied with, the ſame in the end teaching Men to diſavow GOD in their diſcourſe and actions, by their intemperate and inconſiderate invoking him in their Oaths. Againſt ſuch, as alſo againſt thoſe that ſhall give themſelves up to Curſing, Execrations, Drunkenneſs, Uncleanneſs, or other ſcandalous Actions in Derogation of God's Honour, and corruption of Good Manners; Fines and Impriſonment, or ſuch other Puniſhment may be inflicted on them by a Court Marſhal, which is now reduced to the Forfeiture of one day's Pay; but for Drunkenneſs, the ſame extends not to Commanders, or other Commiſſion and Warrant Officers, for they upon Conviction before the *Admiral*, ſhall be rendred uncapable of their Command.

13 Car. 2. cap. 9. Artic. 2.

By Order of his Royal Highneſs the Duke of *York*, 1666.

And a Lyar convicted on Ship-board, ſhall be hoiſted upon the main Stay with four Braces, having a Broom and Shovel tied to his Back, where he ſhall continue an

Houſe, every Man crying, *A Lyar, A Lyar,* and a Week following, he ſhall clean the Ship's Head and Sides without board, according to the ancient practice of the Navy; if he receives greater Wages than for an able Sea-man, then half a day's Pay.

Lib. 2. c. 3: §. ult. ad Leg. Corn. de Sicariis pun.

VII. By the *Laws of Nations, Spies* may be ſent to ſurvey the Enemy's Force, Fleet, Station, or Squadron, and make diſcovery of whatſoever may give advantage to the Perſons ſending: So *Moſes* and *Joſhua* did into the *Holy Land.* On the other hand being deprehended, they are to be put to death, as *Appian* ſaith. But whether it be lawful to make Spies of the Subjects of that Prince with whom the War is begun, hath been ſome doubt; It is not lawful for a Subject to kill his King, nor to yield up his Ships of War without publick Council, nor to ſpoil his fellow Citizens, to theſe things it is not lawful to tempt a Subject that remains ſuch; nor may any reply, That to him who impelleth ſuch a Man to a wicked Act, that Act, as namely the betraying of his Enemy, is lawful; no body doubts, he may indeed do it, but not in that manner; but yet if a Subject will voluntarily deſert his Prince and Country, *i. e.* ſo enter into a Correſpondency with the Enemy of it, without any impulſe but his own covetous or revengeful Mind, ſurely it cannot be unlawful for the other to receive him. *We receive a Fugitive, by the Law of War,* ſaith *Celſus,* that is, it is not againſt the Law of War to admit ſuch, even a Traitor, *who having deſerted the Enemy's part, electeth ours;* however ſuch Perſons ought not to be rendred, unleſs expreſly ſtipulated *, but ought to be pardoned. By the Laws of England, if any Officer, Soldier or Mariner, in actual Service, and in the Pay in his Majeſty's Fleet, or any other Perſon in the ſame, ſhall give, hold, or entertain any Intelligence to or with any King, Prince or State, being Enemy to, or any Perſon in Rebellion againſt his Majeſty, his Heirs and Succeſſors, without Leave or Authority from the King, Admiral, Vice Admiral, or Officers in Chief of any Squadron, they are to ſuffer Death. Now the bare receipt of a Letter or Meſſage from an Enemy, will not make a Man ſubject to the Penalty of this Article; and therefore the ſubſequent Article explains the precedent, in which it is provided, That if any inferi-

Leg. transfug. D. de acq. rerum Dom.

* As was in the Peace with *Philip,* the *Ætelians, Antiochus, Polyb. in excerpt. legat.* 11. 28. 38. *Menand. Protect. idem. non decet.*

Stat. 13 Car. 2. cap 9. Artic. 3.

our,

our Officer, Mariner, or Soldier, ſhall receive any Letter, or Meſſage from any King, Foreign Prince, State, or Potentate, being an Enemy, or on their behalf; and if ſuch Perſon doth not reveal the ſame within Twelve hours, having opportunity ſo to do, and acquaint the Superior Commander with it, ſuch Perſon is to ſuffer Death; ſo likewiſe, if ſuch Superior Officer or Mariner being acquainted therewith by an Inferior Officer, Mariner, or other, or ſuch Superior Officer, Commander or Mariner, in his own Perſon, receiving a Letter or Meſſage from any ſuch Enemy or Rebel, and ſhall not in convenient time reveal the ſame to the Admiral, Vice-Admiral or Commander of the Squadron, he ſhall ſuffer the like pain of Death, or ſuch Puniſhment as a Court Marſhal ſhall inflict. Now *Spies* are put to Death ſometimes juſtly by thoſe that manifeſtly have a juſt cauſe of Warring, by others by that licence which the Law of War granteth; nor ought any Perſon to be moved with this, that ſuch being taken, are puniſhed with Death; for that proceeds not from their having offended againſt the Law of Nations, but from this, that by the ſame Law every thing is lawful againſt an Enemy: And every one, as it is for his own Profit, determineth either more rigorouſly or gently: But that *Spies* are both lawful and practicable, there is no Queſtion; for at this day by the general Inſtructions of Fleets, there are always out of each Squadron ſome Frigats or Ships appointed to make diſcovery of the Enemy; and upon ſight to make Sail, and to ſtand with them, in order to take cognizance of their Force, as well Ships of War as Fire-Ships, and in what poſture they lay; which being done, *thoſe detecting Frigats are to ſpeak together, and to conclude on the Report they are to give, which done, they return to their reſpective Squadrons*; ſuch Ships in ſuch Service are not obliged to fight, eſpecially if the Enemies Force exceed them in number, or unleſs they ſhall have an apparent Advantage.

Artic. 4.

Ad Leg. Corn. de Sicariis pan.

Tacit. Hiſt. 5.

VIII. Again, it is not lawful for any, be he Friend or Neuter, to relieve an Enemy, much leſs for a Soldier or Mariner in pay; *to ſupply him that conſpires the deſtruction of my Country, is a liberality not to be allowed of*: he is to be accounted an Enemy that ſupplies the Enemy with Ne-

Bartol. Leg. nullus Leg. 2. de Judais Cælicolis.

Procop. Goth.

Neceſſaries for the War; and therefore by the Laws of War is ſo to be eſteemed; and by the Laws of *England*, *Stat.13.Car.2. cap.9. Artic.5.* If any Perſon in the Fleet relieve an Enemy or Rebel in time of War with Money, Victuals, Powder, Shot, Arms, Ammunition, or any other Supplies whatſoever, directly or indirectly, he ſhall ſuffer Death.

Artic. 6. IX. Ships being aſſaulted and taken as prize, all the Papers, Charter-parties, Bills of Lading, Paſs-ports, and other Writings whatſoever that ſhall be taken, ſeized or found aboard, are to be duly preſerved, and not torn or made away; but the very Originals are to be ſent up entirely and without fraud to the Court of Admiralty, or to the Commander appointed for that purpoſe, in order to the Condemnation of the Prize, upon pain of the Captors loſing their Share in the Prize, and alſo ſubject to ſuch other Puniſhment as a Court Marſhal ſhall think fit.

X. The Right of taking of Spoil was approved of God, within thoſe natural Bounds which have been already mentioned, as is further evinced by the Appointment of God in his *Law* concerning the Acquiſition of Empire over the conquered, after refuſal of Peace, (*Deut. 20. 14.*) *All the ſpoil thereof ſhalt thou take unto thy ſelf, and thou ſhalt eat the ſpoil of thine Enemies, which the LORD thy GOD hath given thee.* Hence it is, that things taken from the Enemy, preſently become theirs that take them by the Law of Nations, and ſuch Acquiſition is called *Natural*, for not any cauſe, but the naked fact is conſidered; And thence a Right ariſeth; for as the Dominion of things began from Natural Poſſeſſion, and ſome print of the ſame remains in the things taken in the Land, the Sea, and the Air, ſo likewiſe of things taken in War; all which inſtantly become theirs that firſt become Captors: and from the Enemy are judged to be taken away thoſe things alſo which are taken away from the Subjects of the Enemy. But though this gives a Right to the Captors, yet that muſt be underſtood to the Sovereign, or to the State that imployed them, and not to themſelves; but if they have any ſhare of the Prize, the ſame proceeds by the condeſcenſion or grant of the Sovereign, which may be enlarged or abridged as occaſion ſerves; and therefore by the Laws of *England*, (*Artic. 7.*) *Ships of War having taken a Prize* th

Leg. Nat. §. ult. de D. acq. rer. Dom. tit. de rer. dom.

Quæ armis quæſita eſſent & parta belli jure non dimittenda.

the Goods and all manner of Lading is to be preſerved, till Adjudication ſhall paſs; but that is to be underſtood, where the Ship voluntarily yields: but Ships whom they ſhall aſſault, and take in fight as Prize, the pillage of all manner of Goods and Merchandizes (other than Arms, Ammunition, Tackle, Furnitures, or Stores of ſuch Ships) as ſhall be found by the Captors, *upon or above the Gun-Deck of the Ship, become theirs*; but this is to be underſtood where ſuch Prize may lawfully be poſſeſt; for there are times when ſuch are not to be meddled with; and therefore it is againſt the Rules of War in Fight, if ſome of the Enemies Ships are there diſabled; yet thoſe Ships that did ſo diſable them, if they are in a condition to purſue the Enemy, cannot during the Fight take, poſſeſs, or burn ſuch diſabled Ships, and the reaſon is, *leſt by ſo doing ſome more important ſervice be loſt*, but they are to wait for ſuch Booty, till the *Flag*-Officers ſhall give command for the ſame.

By the donation of his *Majeſty*.

Artic. 8.

Vluzzali, King of *Algier*, in the famous Battel of *Lepanto*, having behav'd himſelf very valiantly there againſt the *Chriſtians*, ſo that he deſtroyed ſeveral of their Gallies, and others, he took amongſt the reſt the Gallies of *Pietro*, *Bua* of *Corſa*, and of the *Prior of Meſſina*, and *Ludovico Tipico* of *Trabu*, *Benedeto Soranza*, the which he towed after him before the Battle was compleated; but that getting proved the loſs both of the one and of the other; for the *Turks* out of Covetouſneſs of the Plunder, or otherwiſe thronging into them, occaſioned their taking fire, in which the *Victors* in thoſe Flames became *Victims*, and after followed the total Rout of the *Ottoman* Power.

Hiſt. Reipubl. Venet. fol. 127, 128.

XI. It is almoſt impoſſible, but that in Ships of War, which in theſe days carry ſo conſiderable a force of men, there will be ſome amongſt them that have Heads of knavery, and Fingers of Lime Twigs, not fearing to ſteal that from their Prince which is applicable only for the Good of their Country; ſuch ſort of *Night-wolves* when caught, are to be ſeverely puniſhed; and therefore to ſteal or take away any Cables, Anchors, Sails, or any of the Ships Furniture, or any of the Powder or Arms, or Ammunition of the Ship, ſubjects the Offender to the pains of Death, or to ſuch other Puniſhment as the Quality of the Offence ſhall be found by a Court-Marſhal to deſerve.

Artic. 8.

XII.

Artic. 9.

XII. By the Ninth Article, *Foreign Ships or Veſſels taken as Prize, without fighting, none of the Captains, Maſters, or Mariners being Foreigners, ſhall be ſtripp'd of their Cloaths, or in any ſort beaten, pillaged, or evil intreated; and the Perſons ſo offending being obliged to render double Damage:* This Law moſt expreſly doth not extend to thoſe that obſtinately ſhall maintain a Fight; for moſt certain, by the Law of Arms, if the Ship be boarded and taken, there remains no reſtriction but that of Charity; and if a Ship ſhall perſiſt in the Engagement, even till the laſt, and then yield to mercy, there hath been ſome doubt, * whether Quarter ought to be given to ſuch; (for they may ignorantly maintain with courage a bad cauſe) but in Captives and thoſe that yield or deſire to yield, there is no danger. Now that ſuch may be juſtly killed, there muſt be ſome antecedent Crime, and that ſuch a one as an equal Judge would think worthy of Death; and ſo we ſee great ſeverity ſhewed to the Captives and thoſe that have yielded, or their yielding on condition of Life not accepted, if after they were convinced of the Injuſtice of the War, they had nevertheleſs perſiſted with Hatred or Cruelty, if they had blotted their Enemies Name with unſufferable diſgraces, if they had violated their Faith or any Right of Nations, as of Ambaſſadors, if they were Fugitives: But the Law of Nature admits not Taliation, except againſt the very individual Perſon that hath offended; nor doth it ſuffice that the Enemies are by a fiction conceived to be as it were one Body; tho' otherwiſe by the Laws of Nations, and by the Laws of Arms, and at this day practiſed, in all Fights, the ſmall Frigates, Ketches, and Smacks are to obſerve and take notice of the Enemies Fire-ſhips, and to watch their Motion, and to do their beſt to cut off their Boats, and generally *the perſons found in them are to be put to death, if taken, and the Veſſel, if not taken, deſtroyed;* and the reaſon why the extremity of War is uſed to ſuch, is that by how much the Miſchief is the greater by the Act of ſuch Men, if executed, by ſo much the Puniſhment is aggravated, if taken, and Quarter denied them by the Law of War.

Cræſus perſwading *Cyrus* not to give up *Lydia* to be pillaged by his men, tells him, *Non meam, inquit, non res meas diripies, nihil enim ad me jam iſta adpertinent: tua ſunt, tua illi perdent. Herod. lib:* 1.

* *Victor de Jure Belli, n.* 49. *&* 60: *D. & C. de Juris & facti ignorantiâ.*

Princes indeed are *Gods*, but neither do the Gods hear the prayers of ſuppliants, except they be juſt. The *Saracuſians* were accuſed for that they ſlew the Wives and Children of *Hycetas*, becauſe *Hycetas* had ſlain the Siſter and Son of *Dion Plutarch, Timon, & Dion.*

XIII.

XIII. *Every Captain or Commander upon ſignal or order of Battel, or view, or ſight of any Ships of the Enemy, Pirate, or Rebel, or likelihood of Engagement, are to put all things in the Ship in fit Poſture for a Fight, as the breaking down the Cabins, clearing of the Ships of all things that may impede the Soldiers in the preſerving the Ship and themſelves, and endamaging the Enemy; and every ſuch Commander or Captain are in their own Perſons, and according to their Place, to hearten and incourage the inferiour Officers and Common Men to fight valiantly and couragiouſly,* * *and not to behave themſelves faintly under the Diſgrace of being caſhiered, and if he or they yield to the Enemy, Pirate or Rebel, or cry for quarter, he or they ſo doing, ſhall ſuffer the pains of Death, or ſuch other Puniſhment as the Offence ſhall deſerve.* Now, though Soldiers or Mariners have obliged themſelves faithfully to ſerve in the Expedition or Navy; yet that is to be underſtood no further than his or their power to do their utmoſt in his or their Quality; for though the Obligation for the Service be taken in the ſtricteſt Terms of undergoing death and danger; yet it is to be underſtood always conditionally as moſt Promiſes are, *viz.* if the action or paſſion may be for that Fleet or Prince's advantage, and therefore if the Fleet or Squadron is beaten and the Ships are diſabled, and left ſcarce without any to defend them, now the Soldiers or * Mariners remaining can do no more for their Prince than die, which indeed is to do nothing at all, but to ceaſe for ever from doing any thing either for him or themſelves; in thoſe ſtraits therefore it is not repugnant to their Oath called *Sacramentum Militare*, to ask quarter or to ſtrike, and having beg'd a new Life and taken it, they are bound in a new and juſt Obligation of Fidelity to thoſe whom they were bound to kill few hours

In *England* when the Admiral would have the Van of the Fleet to tack firſt, the Admiral did generally put abroad the Union Flag at the ſtaff on the fore-top-Maſt head (that was when the Red Flag was not abroad.) But if the Red-Flag had been abroad, then the fore-top-ſail was to be lowered a little, and the Union-Flag was to be ſpread from the Cap of the fore-top-Maſt downwards. When the Reer of the Fleet was to tack firſt, the Union-Flag was put abroad on the Flag-ſtaff of the Mizon-top-Maſt-head, upon which two Signals the Flag-Ships were to continue the ſame Signals on their Ships, till the ſame was anſwered; when the *Admiral* would have all the Ships to fall into the Order of Battel preſcribed at the *Council of War*, the Union-Flag was put on the Mizon Peek of the *Admiral's* Ship, upon ſight of which the *Admirals* of the other Squadrons were to anſwer it by doing the like Signal: when the *Admiral* would have the other Squadrons to make more ſail, though himſelf ſhorten ſail, a white Enſign was put on the Enſign-ſtaff of the *Admiral's* Ship: Inſtructions firſt of *May*, 1666. but yet ſignals may be altered or changed as often as it ſhall pleaſe the *Admiral* to think the ſame neceſſary and convenient. * *Artic.* 10.

* *Lipſius de Mil. Rom. l.* 2. *dial.* 6, & 4. And *Polybius* expreſſeth the Oath thus, *Obtemperaturus ſum, & facturus quicquid mandabitur ab Imperatoribus juxta vires*: and ſuch, ſays he, were termed *Milites per Sacramentum.*

before

before; neither can the Prince or General expect by virtue of their former Obligation to him, they ſhould kill any in the place were the quarter was given: However, this Fidelity hath not its inception from the time of taking quarter; but when the Battle is over, and that time which is termed cold blood; for without all controverſie, if a Ship be boarded, and Quarter is given, yet if while the Fight laſts, the Perſons Captives can by any poſſibility recover their Liberty and Ship, they may by the *Law of Arms*, juſtly acquire the ſame *.

* Sir *Thomas Chichley* did ſo aboard the *Katherine in bello, Anno* 1666. *inter Carolum Secundum & Celſos & Prepotentes Dominos Ordines Generales Fœderati Belgii.*

And ſince Impunity is granted to ſuch unfortunate Deſerters, yet it muſt be apparently evident and fully proved, that they were reduced into a Condition beyond all hope in the Battel: and therefore the Foot that forſook the *Unfortunate Pompey* before the Field was loſt, were juſtly condemned for the breach of the *Roman* Diſcipline and Law of Arms: and therefore the Article hath not poſitively declared Death only, but added, or ſuch other Puniſhment as the Offence ſhall deſerve, which Proviſion leaves the Action to be judged and puniſhed by a *Council of War*, who know beſt what's to be done in Caſes of that nature; however, *a baſe or cowardly yielding, or crying quarter, is to be puniſhed with Death; and that without mercy.*

Xenoph. Cyr. Plutarch. Qu. Rom. 39. & *Marcell. Vide* in Tit. Ships of War.

XIV. The obeying of Orders hath in all Ages been in mighty eſteem: *Chryſantus*, one of *Cyrus*'s Soldiers, being upon his Enemy, withdrew his Sword, hearing a Retreat ſounded; but this comes not from the external *Laws of Nations*; for as it is lawful to ſeize on the Enemy's Goods, ſo likewiſe to kill the Enemy, for by that Law the Enemies are of no account; but ſuch Obedience proceeds from the *Military Diſcipline* of ſeveral Nations. By the *Romans* it was a Law noted by *Modeſtinus*, That whoſoever obeyed not his Orders, ſhould be puniſhed with death, though the matter ſucceeded well: Now he alſo was ſuppoſed not to have obeyed, who out of Order without the Command of the *General* entred into any Fight. For if ſuch liberty were lawful, either Stations would be deſerted

Leg. deſert. D. de re Milit.

Liv. lib. 7. *Manliani Imperia.*

ſerved, or (licence proceeding) the Army, Fleet, or Squadron would be engaged in unadviſed Battels, which by all means is to be avoided. *M. Capello*, a *Venetian* Gentleman of an ancient Extraction, having the Charge of the *guarding of the Venetian Gulph* *, met with the *Barbary Fleet*, whom he ſo aſſaulted, that he burnt and took divers of them; amongſt the reſt the *Admiral Galley of Algier*, (a Veſſel of vaſt bigneſs) which he brought with him away, and ſhe remains at this day a *Trophy* in the *Arſenal of Venice*; the Service, although Noble and Honourable, and ſuch as brought renown to the Republick, yet in regard it was an Action exceeding his Commiſſion, he was adjudged to puniſhment: (but his great Merit and Alliance preſerved his Life) ſuch an exact Obedience that *Signory* expects to be paid to her Orders, be the Succeſs never ſo glorious. And by the Eleventh Article †, Every Captain, Commander, and other Officer, Seaman or Soldier of any Ship, Frigate, or Veſſel of War, are duly to obſerve the Commands of the Admiral or other his Superior, or Commander of any Squadron, as well for the aſſaulting and ſetting upon any Fleet, Squadron, or Ships of the Enemy, Pirate or Rebels, or joyning Battel with them, or making defence againſt them, as all other the Commands of the Admiral or other his Superior Commander, the diſobeying of which ſubjects him to the pains of Death, or ſuch other Puniſhment as the Quality or Neglect of his Offence ſhall deſerve.

The Order of Battel is to be preſerved, and in all caſes they are to endeavour to keep in one line as much as may be; and though they have beaten ſome of the Enemy, yet muſt they not purſue a ſmall number, before the main of the Enemy be beaten or run. Nor ought they in chaſing, chaſe beyond ſight of the Flag, and at night all chaſing Ships are to return to the Flag. *Inſtr.* 22, 23. *in May* 1. 1666.

* Hiſtory of the Republick of *Venice*, *fol.* 170, 171.

† *Artic.* 11.

XV. Again, Every Captain and all other Officers, Mariners and Soldiers of every Ship, Frigate, or Veſſel of War, ſhall not in time of any Fight or Engagement withdraw or keep back; but on the other hand, they are to come into the Battle, and engage, and do their utmoſt endeavour to take, fire, kill, and endamage the Enemy, Pirate or Rebel, and aſſiſt and relieve all other his Confederate Ships; and if they ſhall prove Cowards, they are to be dealt with as Cowards ought by the Law of Arms, which is to ſuffer Death: But circumſtances of things may make alteration of Matters, therefore there is added other puniſhment, as the circumſtance of the Offence *Artic.* 12.

Offence ſhall deſerve, or a *Court Marſhal* think fit. By the word *Captain* the *General* or *Admiral* is not included, but all *Flag-Officers* and others under them, are within the purview of the *Statute* by the denomination of the word *Captain*, &c. and the Reaſon wherefore ſuch Commanders in Chief are not within the *Law*, is, becauſe the Weapon of a *General* is his Truncheon, but of all other Officers is the Sword; a *General* is only to command, and the reſt to execute, for in the latter is the danger only of one Man's life, but in the firſt is the hazard of all; therefore by the Law of Arms no *General* or *Admiral* in Chief ought to expoſe their Perſon to apparent Peril, but in caſe of a general Overthrow and manifeſt Defeat. *Peter Capponi*, the Famous *General* for the *Florentines* beſieging *Soiana*, and encamping on the River *Caſina*; † being in a Place of danger, extreamly induſtrious about planting his Battery, was ſhot with a Harquebuſs, immediately upon which the Siege was raiſed; yet on the other hand, let it be examined where any famous Battel hath been obtained, and the ſame was not got, not only by the Conduct, but likewiſe by the ſingle and perſonal Courage of the *General*.

In milite unius ſors eſt, in Imperatore univerſorum periculum: unus homo pluris fuit quam univerſa civitas.

Clearchus, Cyro dedit conſilium, ne ipſe ſe in periculum offerret ſed inſpectorem ſe pugnæ gereret; pugnantem enim corpore nil magni efficeret, ſi verò quid damni acceperit, omnes ſe perditurum quos ſecum haberet. Polyb. Stra. lib. 2.

† *Guicciard l. 3. Aphor. 28.*

There are ſome Offices to be done, even to them from whom you have received an Injury; for Revenge and Puniſhment muſt have a meaſure; and therefore the Iſſues of the *Roman Wars* were either mild or neceſſary: Now when killing is juſt in a juſt War, according to internal Juſtice, may be known by examining the Cauſes or End of the War, which may be for the Conſervation of Life and Members, and the keeping and acquiring of things uſeful unto Life; now in the aſſaulting of Ships, it happens that one is ſlain on purpoſe or without purpoſe; on purpoſe can no man be ſlain juſtly, unleſs either for juſt puniſhment, as if without it we cannot protect and defend our Life, Goods, and Country, *&c.* That ſuch Puniſhment may be juſt, it is neceſſary that he who is ſlain have offended, and that ſo much as may be avenged with the puniſhment of Death in the Sentence of an equal Judge. Now we muſt note, between full Injury and mere Miſfortune often intercedes ſome mean, which is as it were compoſed of both, ſo that it can neither be called the Act of

Cicero Offic. 1. & 2.

Grotius de Jure Belli ac Pacis, l. 1. c. 2. §. 1.

Miſericordia infortuniis debetur: at qui deliberatâ ſcientiâ malè agit,

of one knowing and willing, not merely the act of one ignorant or unwilling.

This Diſtinction by *Themiſtius* is fully illuſtrated: *You have made a difference betwixt an Injury, a Fault, and a Misfortune; although you neither ſtudy* Plato, *nor read* Ariſtotle, *yet you put their Doctrine in practice; for you have not thought them worthy of equal puniſhment, who from the beginning perſwaded the War, and who afterward were carried with the ſtream, and who at laſt ſubmitted to him, that now ſeemed to have the higheſt Power; the firſt you condemned, the next you chaſtiſed, the laſt you pitied.* Moſt certain, to ſpare Captives or Priſoners of War, is a command of Goodneſs and Equity; and in Hiſtories they are often commended, who when too great a number prove burdenſome or dangerous, choſe rather to let them all go than to ſtay them, or detain them, though for Ranſoms; as in the laſt *Flemiſh* Wars with *England*. So for the ſame cauſes, they that ſtrike or yield up themſelves are not to be ſlain, (though there is no Proviſion made by Covenant.) In Towns beſieged it was obſerved by the *Romans*, before the *Ram* had ſmitten the Wall; *Cæſar* * denounceth to the *Aduatici*, he would ſave their City, if before the *Ram* had touched the Wall, they yielded; which is ſtill in uſe in weak Places, before the great Guns are fired; in ſtrong Places, before an Aſſault is made upon the Walls †; and at Sea, by firing one or two Guns, or hanging out the Bloody Flag, according as the Inſtructions are; however till there be an abſolute yielding or quarter cryed, by the *Law of Arms*, as well as the abovementioned Article, every Commander and Soldier is to do his utmoſt to take, fire, kill, and endamage the Enemy, or whatſoever may tend thereunto.

non infelix, ſed injuſtus: And *Cicero* hath a Saying out of *Demoſthenes*; We muſt ſhew compaſſion to thoſe whom Fortune, not their own Deeds, have made miſerable.

Scipio Æmilianus at the Overthrow of *Carthage*, proclaim'd that they ſhould fly that would.

Polybius, vide Tacitus Annal. 12.

Vide Serran. in reb. Franc. 1. *& Hen.* 2.

Thucyd. lib. 3.

* *Cæſar lib.* 2. *de bello Gallico.*

† *Dinant* in *Germany* being taken by Aſſault, the Town was razed and burnt, and the Priſoners all put to Death. *Vide Phil. Comin. lib.* 2. *cap.* 1.

XVI. By the *Law of Arms*, he deſerves puniſhment who doth not keep off force that is offered to his fellow Soldier; and though it hath been conceived, if there be manifeſt danger, that he is not bound to come in to his Relief; for ſuch Commander may prefer the lives in his own Ship before thoſe in another, yet that ſuffices not; for every Soldier by the Law of Ams, is not only bound

I will defend my Companion at the hazard

to defend, but alſo to aſſiſt and relieve his Companion: now Companions are in two reſpects, either thoſe that are in actual ſervice with ſuch Soldiers, or thoſe that are not, but only committed to their Protection or Convoy, which are to be defended and guarded at the ſame peril and charge that a fellow Soldier is; and therefore all Ships that are committed to Convoy and Guard, They are diligently and carefully to be attended upon without delay, according to their Inſtructions, in that behalf: And whoſoever ſhall be faulty therein, and ſhall not faithfully perform the ſame, and defend the Ships and Goods in their Convoy, without either diverting to other parts or occaſions, or refuſing or neglecting to fight in their defence, if they be ſet upon, or aſſailed, or running away cowardly, and ſubmitting thoſe in their Convoy to Hazard and Peril, or ſhall demand or exact any Money or other Reward from any Merchant or Maſter, for conveying of any ſuch Ships or other Veſſels belonging to His Majeſty's Subjects, ſhall be condemned to make reparation of the Damage to the Merchants, Owners, or others, as the Court of Admiralty ſhall adjudge, and alſo be puniſhed criminally according to the quality of their Offences, be it by Pains of Death or other Puniſhment, according as ſhall be adjudged fit by that Court Marſhal.

Of my own Blood, and partake in his danger. *Senec. de Ben.* 2. 15.

Artic. 13.

Protection of Convoys by the *Laws of Nations*, is of a great Utility to a Kingdom or State; therefore when Violence is offered to thoſe Ships under Convoy, they are not ſaid to be done to them, but to thoſe Ships of War under whoſe Guard they paſs; and therefore when Violence is offered to ſuch, publick Revenge is let in, according to that of *Tacitus*, *He ſhould provide for their Security by a juſt Revenge.* Now that ſuch Ships may not ſuffer Wrong from their Invaders, two ways may be taken by their Convoys: firſt, by deſtroying him or them that ſhall have attempted and committed any hoſtile Act againſt any thing under their Protection; ſecondly, by all ways imaginable endeavour the weakning his or their Force, that he or they may not be able to do any other or further Hurt; therefore there is no doubt but Vindication to theſe Ends is within the Bounds of Equity, though this is no more than private; yet if we reſpect the bare Law of Nature, abſtract from Laws Divine and Humane, and

Etiam hujus rei in feris imago quædam. Leo in Adulteræ pœnam conſurgit. *Plin. Hiſt. Nat.* 8. 16.

and from all not neceſſary Accidents to things, it is not unlawful, whether the Satisfaction or Revenge is taken by Convoy Ships themſelves, or the wronged ones under his or their Guard or Protection, ſeeing it is conſentaneous to Nature, that Man ſhould receive Aid from Man; and in this Senſe may be admitted that ſaying of *Cicero*, *The Law of Nature is that which comes not from Opinion, but innate Vertue*: Among the Examples of it is placed *Vindication*, which he oppoſes to Favour; and that none might doubt how much he would have underſtood by that name, he defines Vindication, *whereby, by defending or revenging, we keep off Force and Contumely from us and ours, who ought to be dear unto us, and whereby we puniſh Offences.*

Now thoſe Ships that are not under Convoy, but ingaged in Fight, are faithfully to be relieved; and therefore if a Squadron ſhall happen to be over-charged and diſtreſſed, the next Squadron or Ships are to make towards their relief and aſſiſtance upon a Signal given them; which is generally given in the *Admiral's* Squadron by a Pendant on the Fore-top-maſt-head of any Flag-Ship; in the *Vice-Admiral's* Squadron, or he that commands in Chief in the ſecond place, a Pendant on the Main-top-maſt-head; and the *Reer-Admiral's* Squadron the like: but theſe Signals ſometimes change, according to the Wiſdom and Reſolution of the *Admiral*. Again, Ships that are diſabled by loſs of Maſts, ſhot under Water, or the like, ſo as they be in danger of ſinking or taking, the diſtreſſed Ships generally make a Sign by Waft of their *Jack* and *Enſigns*, and thoſe next to them are bound to their Relief: but yet this does not always hold place; for if the diſtreſſed Ship is not in probability of ſinking, or otherways encompaſſed with the Enemy, the Reliever is not to ſtay under pretence of ſecuring them, but ought to follow his Leader and the Battle, leaving ſuch lame Ships to the Sternmoſt of the Fleet, it being an undoubted Maxim, *That nothing but beating the Body of the Enemy can effectually ſecure ſuch diſabled Ships.*

XVII. It is not enough that Men behave themſelves valiantly in the beating of an Enemy, for that is not all, but the reducing of them into a condition to render right either for Damage done, or to render that which is right; which can't well be done without bringing him to Exi-

gences and Straits; and therefore if the Enemy, Pirate, or Rebel be beaten, None, neither through Cowardize, Negligence; or Diſaffection, ought to forbear the purſuit, and thoſe of them flying; nor ought ſuch either through Cowardize, Negligence, or Diſaffection, forbear the aſſiſting of a known Friend in view, to their utmoſt Power, the Breach of which ſubjects the Offenders to the Pains of Death, or at leaſt ſuch Puniſhment as a *Court Marſhal* ſhall think fit.

Artic. 14.

But that is to be underſtood as in the 12 §. of this Chapter.

Empires are got by Arms, and propagated by Victory; and by the *Laws of War*, they that have overcome, ſhould govern thoſe they have ſubdued. Hence it is, that Generals having compleated a Conqueſt in a juſt War, and in chaſe or otherwiſe have taken the Ships or Goods of the Enemy, have abſolute Power over the Lives, Eſtates, Ships and things that they by Force of Arms have acquired by the *Laws of Nations.*

But yet in ſuch Conqueſts where the reeking Sword knows no Law, that is, they are done *impunè*, without Puniſhment, (becauſe co-active Judges do grant them their Authority) yet ſuch Power may be exorbitant from that Rule of Right called *Virtue*; and though by the *Law of War* Captives may be ſlain, yet what Law forbids not, Modeſty prohibits to be done. Hence it is that *Generals* do often reſtrain that Power of killing; for though ſuch Priſoners of War do fight for the Maintenance of an unjuſt Cauſe, and although the War is begun by a ſolemn Manner; yet all Acts that have their riſe from thence, are unjuſt by internal Injuſtice, ſo that they who knowingly do perſiſt in fighting, * yet ought they not always to be ſlain, according to that of *Seneca*: *Cruel are they*, ſays he, † *that have Cauſe of Puniſhment, but have no meaſure.* For he that in puniſhing goes further than is meet, is the ſecond Author of Injury; and the principal Reaſon why Mercy is often ſhewed, is for that Soldiers of Fortune offend not out of any Hatred or Cruelty, but out of Duty.

Tacit. 3. *Annal. Pompeius gravior remediis quam delicta erant.*

* *Grot. de Jure Belli ac Pacis, l.*3.*c.* 10. §.

† 2. *de Clem. cap.* 4.

XVIII. Again, *Generals* in the Meaſure of killing, look commonly no further than the Deſtruction of thoſe who by Force of Arms oppoſe them; and though Ships or Cities are taken by Aſſault, the which by the Laws of War ſubjects every individual to the Mercy of the Conqueror,

querour, yet Children, Women, old Men, Prieſts, Scholars, and Husbandmen are to be ſpared; the firſt by the Law of Nature, according to that of *Camillus*: *We have Arms*, ſays he, *not againſt that Age which even in taking Cities is ſpared, but againſt armed Men*: and this is the Law of Arms amongſt good Men; by which we are to note, that by the Words *good Men*, as is obſerved, we mean the Law of Nature, for ſtrictly by the Law of Arms, the Slayers of them are without Puniſhment.

In Vita Camilli. Liv. lib. 1, & 5.

Grotius de Jure Belli ac Pacis, lib. 3. *cap.* 11. who obſerves, that many Pretences may be found out againſt Men of mature Age, but againſt Infants, Calumny it ſelf can find nothing to ſay, as being clearly Innocents.

Now that which hath always place in Children that have not attained the uſe of Reaſon, for the moſt part prevails with Women; that is, unleſs they have committed ſomething peculiarly to be avenged, or do uſurp manly Offices, as flinging of Stones from the Walls, pouring down burning Pitch, Brimſtone, and the like bituminous Stuff, firing of Guns, and the like; for it is a Sex that hath nothing to do with the Sword, that are capable of that Clemency.

Herod. in Vita Maximin. fol. 417.

The like for Old Men, who, *Papinius* obſerves, are not to be ſlain; ſo for Miniſters of ſacred things, even barbarous Nations have had them in Reverence and Preſervation; as the *Philiſtines*, Enemies of the *Jews*, did to the *College of Prophets*, to whom they did no Harm: and with thoſe Prieſts are juſtly equalled in this reſpect, they that have choſen a like kind of Life, as *Monks* and *Penitents*, whom therefore as well as Prieſts, the *Canons* following in natural Equity will have ſpared: * to theſe are deſervedly added thoſe that give themſelves to the ſtudy of good Learning and Sciences uſeful to Mankind, be it in *Univerſities*, or other publick *Schools* or *Colleges*. But yet if any of theſe be taken in actual Service, they then may receive the common Fate of others. So our King *Richard* the Firſt, having taken the Martial Biſhop of *Beauvais* Priſoner, received a Letter from the *Pope*, that he ſhould no longer detain in Cuſtody his dear Son; the Knig ſent the *Pope* back the Armour wherein he was taken,

Papin. nullis violabilis armis turba ſenes. Vict. D. loco. 1 Sam. 10. 5. & 1 Sam. 19. 18.

* Lord *Coke*'s Comm. on 30 Cap. of *Magna Charta fol.* 58. *C. de Guerra & Pace*

taken, with the Words of *Jacob*'s Sons to their Father, *See whether or no this be the Coat of thy Son.*

Leg. execut. C. quæ res pign. To theſe are added Tradeſmen, ſo likewiſe Merchants, which is not only to be underſtood of them that ſtay for a time in the Enemy's Quarters, (but of perpetual Subjects) for their Life hath nothing to do with Arms, and under that Name are alſo contained other Workmen and Artificers, whoſe Gain loves not War but Peace.

Vide 2. Inſtit. fol. 58, & Trin. 21 E. 1. coram Rege Rot. 127.

Again, Captives, and thoſe that yield, are not to be ſlain, for to ſpare ſuch *is a Command of Goodneſs and Equity*, ſays *Seneca*; however it may ſo come to paſs, that though the military Power may exempt a Priſoner of War from the Execution of the Sword, yet it may be out of their Power to exempt or diſcharge a Delinquent or Traitor from the Execution of the Magiſtrate, as if the Fleet were prepared, and the War principally begun for the Suppreſſion of ſuch; and the Reaſon of this is, if it ſhould be in the Power of one Soldier, who takes a Traitor Priſoner upon ſuch Terms, it would *pari ratione* be in the Power of all to pardon; not that the Article hath no effect, for the Traitor is by that freed from the immediate Execution of the Sword: Sure it is, that if the yielding be in *aperto prælio*, methinks abſolute Pardon is implicitly in the Contract; however this is undeniable, that having yielded himſelf Priſoner of War, if he eſcape, he for ever loſes the Benefit of the Promiſe. Nor are Hoſtages to be deſtroyed, according to that of *Scipio*, who ſaid: *He would not ſhew his Diſpleaſure on harmleſs Hoſtages, but upon thoſe that had revolted; and that he would not take Revenge of the unarmed, but of the armed Enemy.* 'Tis very true by the Law of Arms, if the Contract be broke for which they became Hoſtages, they may be ſlain, that is, the Slayer is without Puniſhment: But yet ſome conceive the Slayer is not without Sin, for that no ſuch Contract can take away any Man's Life; that is, I ſuppoſe, an Innocent's Life; but without Controverſy, if thoſe that become Hoſtages be, or were before, in the number of grievous Delinquents, or if afterwards he hath broken his Faith given by him in a great Matter, the Puniſhment of ſuch may be free from Injury.

De Benefic. 5. cap. 18.

Libertinum ingratum in priſtinam redigit ſervitutem. Forteſcue cap. 46.

Liv. lib. 28. The ſame ſaith *Julian* in *Nicetas.*

Grotius de Jure Belli ac Pacis, lib. 3. cap. 11.

XIX.

XIX. Where Offences are of that nature as they may ſeem worthy of Death, as Mutiny, and the like, *&c.* it will be a Point of Mercy, becauſe of the multitude of them, to remit extreme Right, according to that of *Seneca*: *The Severity of a General ſhews it ſelf againſt Particulars, but Pardon is neceſſary when the whole Army is revolting: What takes away Anger from a wiſe Man? the multitude of Tranſgreſſors.* Hence it was, that caſting of * Lots was introduced that too many might not be ſubjected to puniſhment.

de Ira cap. 10. Quicquid multis peccatur multum eſt Magis non ulo quam mmando: ſic enim agendum eſt cum multitudine peccantium, ſeveritas autem exercenda eſt in peccata paucorum. Vide ailium de Pace. publ. lib. 11. cap. 9. 36. * *Vide Grot. lib. 3. cap. 11. §. 17.*

However all Nations have generally made it a ſtanding Rule in the Puniſhment of Mutineers, as near as poſſible, to hunt out the Authors, and make them Examples †. † *Victor de Jure Belli, n. 55. lib. 2.*

And therefore by the 15 Article. If any Man at any time, when Service or Action is commanded, ſhall preſume to ſtop, or put backwards or diſcourage, the ſaid Service and Action, by pretence of Arrears of Wages, or upon any pretence of Wages whatſoever, they are to ſuffer Death; and indeed the ſame ought to be without Mercy, by how much the more they may raiſe a Mutiny at a time when there is nothing expected but an Action, and the ſhewing the moſt obſequious Duty that poſſibly may be; the Breach of which may occaſion the Damage of the whole Fleet, and being of ſuch Dangerous Conſequence, ought to be ſeverely puniſhed. *Guſtavus Adolphus* upon his firſt entrance into *Germany*, perceiving how that many Women followed his Soldiers, ſome being their Wives, and ſome wanting nothing to make them ſo but Marriage, yet moſt paſſing for their Landreſſes (though commonly defiling more than they waſh) the King coming to a great River, after his Men and the Waggons were paſſed over, cauſed the Bridge to be broken down, hoping ſo to be rid of theſe feminine Impediments; but they on a ſudden lift up a panick Shriek which pierced the Skies, and the Souldiers Hearts on the other ſide of the River, who inſtantly fell into Mutiny, vowing not to ſtir a Foot further except with Baggage, and that the Women might be fetched over, which was done accordingly; *Artic. 15.*

ingly; for the King finding this ill Humour ſo generally diſperſed in his Men, that it was dangerous to purge it all at once, ſmiled out his Anger for the preſent, and permitted what he could not amend. So likewiſe the uttering any Words of Sedition or Mutiny, or the endeavouring to make any mutinous Aſſemblies upon any Pretence whatſoever, is made Death: And the very Concealers of any traiterous and mutinous Practices, Deſigns, or Words, or any Words ſpoken by any to the Prejudice of His Majeſty or Government, or any Words, Practices, or Deſigns tending to the Hindrance of the Service, and ſhall not reveal them, ſubject them to ſuch Pains and Puniſhments as a Court Marſhal ſhall think fit. And whereas in any of the Offences committed againſt any of the Articles for the Government of any of *His Majeſty*'s Ships of War, within the narrow Seas, wherein the Pains of Death are to be inflicted, Execution of ſuch Sentence ought not to be made without leave of the *Lord Admiral*; *this of Mutiny is totally* excepted, for ſuch may be executed immediately.

Artic. 19. *Artic.* 34. *Artic.* 20.

XX. It is not lawful for Princes or States to make of their Enemies Traitors, or cauſe them to deſert the Service of their Prince, or to bring over their Ships, Ordinance, Proviſions, or Arms; for as 'tis not lawful for any Subject to do the ſame, ſo neither to tempt him; for he that gives a Cauſe of ſinning to another, ſins alſo himſelf; but if a Man will voluntarily, without any other Impulſe than his own, bring over the Ships or Armies, or deſerts the Service of his Prince to ſerve another, this, though a Fault in the Deſerter, is not in the Receiver: *We receive a Fugitive by the Law of War*, (ſaith * *Celſus*) *that is, it is not againſt the Law of War to admit him, who having deſerted his Prince's part, elected his Enemy's*; nor are ſuch to be rendred, except it ſhall be agreed, as in the Peace of † *Lewis* the Eleventh. However ſuch ſort of Gameſters, if caught, are to be ſeverely puniſhed; and therefore it is provided, That if any Sea-Captain, Officer, or Seaman, ſhall betray his Truſt, or turn to the Enemy, Pirate, or Rebel, or run away with their Ship or Ordinance, Ammunition, or Proviſion, to the weakening of the Service, or yield the ſame up to the Enemy, Pirate or Rebel, they ſhall be puniſhed with Death;

Grotius de Jure Belli ac Pacis. l. 3. *c.* 1. §.

* *Leg Transfug. de acqu. dom. Polyb. in excerp. Legat.* 9 28. 34. *Menand. Protector idem nos docet.*

† *Phil. Comin. lib.* 4. *cap.* 12.

Artic. 16.

Death; ſo likewiſe, If any deſert the Service or the Employment which they are in on Shipboard, or ſhall run away or entice any other ſo to do, they are ſubject to the like pain of Death. And by the Law of Nations, ſuch Deſerters that run away from their Colours or Fleet before Peace proclaimed and concluded, all Perſons of that Prince from whom they fled, have a Right indulged to them to execute publick Revenge. *Artic.* 17.

Tertul. Apol. 9. *c. quando liceat, l.* 2. *in reos majeſtatis & publicos hoſtes omnis homo miles. Vide de lib.* 1. *cap.* 5. *Vide Hetly Rep.* 235. 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. *Hutt.* 134.

XXI. By the Laws of Nations, *Spies* may be ſent to view and ſurvey the Enemy's Force, Fleet, Station, and make diſcovery of whatſoever may give Advantage to the Perſons ſending, as is mentioned above; but being deprehended they are put to Death; and therefore if any Perſon ſhall come from or be found in the nature of Spies, to bring any ſeducing Letters or Meſſages from any Enemy or Rebel, or ſhall attempt or endeavour to corrupt any Captain, Officer, Mariner, or other of the Navy or Fleet, to betray his or their Truſt, or yield up any Ship or Ammunition, or turn to the Enemy or Rebel, he ſhall be puniſhed with Death. *Liv. l.* 2. *c.* 3. *§. ult. ad Leg. Corn. de Sicar. pun.* *Artic.* 18.

XXII. Soldiers and Mariners owe all Reſpect and Duty to their Superior Officers; and therefore when they are in Anger, they ought to avoid them: But above all not to quarrel with, or give them any provoking Language: And therefore by the Law of Arms, a Soldier who hath reſiſted his Captain, willing to chaſtiſe him, if he hath laid hold on his Rod, is caſhier'd, if he purpoſely break it, or laid violent Hands upon his Captain, he dies: * And by the Laws of *England*, if any Perſon ſhall preſume to quarrel with his ſuperior Officer, he ſhall ſuffer ſevere Puniſhment; and if he ſtrikes him, he ſhall ſuffer Death, or otherwiſe as a *Court Marſhal* ſhall adjudge the Matter to deſerve †.

* *Leg. milit. D. de re milit. Rufus Leg. militar. cap.* 15.

† *Artic.* 21.

XXIII. And though Mariners and Soldiers may have juſt Cauſe of Complaint, as that their Victuals or Proviſions are not good, yet muſt they not mutiny or rebel, whereby to diſtract or confound the whole Crew, but muſt make a civil and humble Addreſs to their Commander, that the ſame may be amended; and if the

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Bacon's Maxim *fol.* 17. *Privilegium non valet contra rempublicam.*

Caſe be ſuch, that the Commander cannot redreſs the ſame, by going to Port to ſupply the Exigencies, without Detriment of the Fleet, (as if ready to engage, or the like) they muſt, like Men and Soldiers, bear with the Extremity, conſidering that 'tis better that ſome Men ſhould periſh, nay the whole Crew in one Ship, than the whole Fleet; nay, perhaps the whole Kingdom be deſtroyed: And therefore if any in the Fleet find Cauſe of Complaint of the Unwholſomneſs of his Victuals, or upon other juſt ground, he ſhall quietly make the ſame known to his Superior or Captain, or Commander in Chief, as the Occaſion may deſerve, that ſuch preſent Remedy may be had, as the matter may require; and the ſaid Superior or Commander is to cauſe the ſame to be preſently remedied accordingly; but no Perſon upon any ſuch or other Pretence, ſhall privately attempt to ſtir up any Diſturbance, upon pain of ſuch ſevere Puniſhment as a *Court Marſhal* ſhall think fit to inflict.

Artic. 22.

Artic. 24.

XXIV. And as the Law doth provide that there be no waſte or ſpoil of the King's Proviſion, or imbezlement of the ſame; ſo likewiſe that care be taken, the Ships of War neither through Negligence or Wilfulneſs be ſtranded, ſplit or hazarded, upon ſevere Penalties. In Fights, and when great Fleets are out, there are generally Inſtructions appointed for all *Maſters*, *Pilots*, *Ketches*, *Hoyes*, and *Smacks*, who are to attend the Fleet, and to give them notice of the Roads, Coaſts, Sands, Rocks, and the like; and they have particular Stations allotted them, and Orders given, that if they ſhall find leſs Water than ſuch a proportion, they then give a Signal as they are directed to give, and continue their Signal till they are anſwered from the Capital Ships.

But in time of Fight they generally lay away their head from the Fleet, and keep the lead; and if they meet with ſuch a Proportion of Water as is within their Directions, they are to give ſuch Signal as they receive Orders for, and ſtand off from the danger; but the wilful burning of any Ship or Magazine-ſtore of Powder, Ship-boat, Ketch, Hoy, or Veſſel, or Tackle, or Furniture thereunto belonging, not appertaining to an Enemy or Rebel, ſhall be puniſhed with Death.

XXV. There are other faults often committed by the Crew,

Crew, the which the Law does puniſh, as a quarrelling on Ship board, uſing provoking ſpeeches tending to make quarrel or diſturbance, Murthers, wilful killing of any Man, Robbery, Theft, and the unnatural Sin of Sodomy and Buggary, committed with Man or Beaſt: all which, and all other Faults and Miſdemeanours are puniſhed with Death, or according to the Laws and Cuſtoms in ſuch caſes uſed at Sea; and when any Perſons have committed any of the Offences particularly mentioned in the *Statute* of 13 *Car.* 2. *Cap.* 9. and contained in the Articles, or any others, and for the which they ſhall be committed, the Provoſt Marſhal is to take them into cuſtody, and not ſuffer them to eſcape, and all Officers and Seamen are to be aiding and aſſiſting to Officers for the detecting and apprehending of Offenders. *Artic* 23. *Artic.* 28. *Artic.* 29 *Artic.* 33. *Artic.* 31.

Touching the Puniſhments that the *Roman Generals* uſed to their Soldiers, when they were at a *Court Marſhal* found faulty, they were commonly proportioned according to the Offence committed: Sometimes they were eaſie, of which ſort were thoſe which only branded the Soldier with diſgrace; others were thoſe that came heavy on the Perſon or Body. To the firſt belonged a ſhameful diſcharging or caſhiering a Mariner or Soldier from the Army, and generally lookt on as a matter of great diſgrace, which puniſhment remains at this day for offences as well in *England*, as in moſt parts. A ſecond was by ſtopping of their Pay; ſuch Soldiers which ſuffered this kind of mulct, were ſaid to be *Ære diruti*, for that *Æs illud diruebatur in fiſcum, non in Militis ſacculum*; the which is and may at this day be inflicted, eſpecially on ſuch as ſhall wilfully ſpoil their Arms, and for the like ſort of offences. A third was a Sentence enjoyned on a Soldier to reſign up his Spear; for as thoſe which had atchieved any Noble Act were for their greater Honour *Hoſta pura donati*, ſo others for their greater diſgrace were inforced to reſign up that Military Weapon of Honour. A fourth ſort of puniſhment was, that the whole *Cohort*, which had loſt their *Banners* or *Standards*, either in the Fields or at Sea, were inforced to eat nothing but Barley-bread, being deprived of their allowance in Wheat, and every *Centurion* in that *Cohort* had his Soldiers Belt or Girdle taken from him, *ignominioſa dimiſſio.* *Fraudat ſtipendii. Roſin. Ant. Rom l.* 10. *c.* 25. *Cenſio Haſtaria.*

which

which was no leſs diſgrace among them than the degrading (among us) one of the *Order of the Garter:* for petty Faults they generally made them ſtand bare-footed before the *General's Pavilion*, with long Poles of Ten Foot in length in their Hands, and ſometimes in the ſight of the other Soldiers to walk up and down with Turff, on their Necks, and ſometimes carrying a Beam like a Fork upon their Shoulders round the Town. The laſt of their Puniſhments was, the opening of a Vein or letting them Blood in one of their Arms, which generally was inflicted on them who were too hot and bold.

Goodwin Antiq. Rom. fol. 127.

The great Judgments, were to be beaten with Rods, which was generally inflicted on thoſe who had not diſcharged their Office, in the ſending about that *Table* called *Teſſera*, wherein the Watch word was written, or thoſe who had ſtoln any thing from the Camp, or that had forſaken to keep Watch, or thoſe that had born any falſe Witneſs againſt their Fellows, or had abuſed their Bodies by Women, or thoſe that had been puniſhed thrice for the ſame Fault, ſometimes they were ſold for Bondſlaves, beheaded and hanged. But the laſt which was in their Mutinies, the puniſhment fell either to Lots, as the Tenth, Twentieth, and ſometimes the Hundredth Man, who were puniſhed with Cudgelling; and with theſe Puniſhments thoſe in *England* have a very near affinity, as cleanſing the Ship, loſing Pay, ducking in the Water, beaten at the Capſons head, hoiſted up the main Yard end with a Shovel at their Back, hanged, and ſhot to Death, and the like.

Lipſ. de milit. Rom. lib. 5. *Dialog.* 18.

XXVI. The *Admiral* may grant Commiſſions to inferiour *Vice Admirals* or *Commanders in Chief* of any Squadron of Ships, to aſſemble *Court Marſhals*, conſiſting of *Commanders* and *Captains*, for the Trial and Execution of any of the Offences or Miſdemeanors which ſhall be committed at Sea; but if one be attainted before them, the ſame works no corruption of Blood or forfeiture of Lands, nor can they try any Perſon that is not in actual Service and Pay in *His Majeſty's* Fleet and Ships of War. But in no caſe where there is Sentence of Death can the Execution of the ſame be without leave of the *Lord Admiral*, if the ſame be committed within the narrow Seas: yet

37. *H.* 6. *fol.* 4, 5.

13 *Car.* 2. *cap.* 9.

yet this does not extend to Mutiny, for there in that caſe the Party may be executed preſently.

All Offences committed in any Voyage beyond the narrow Seas where Sentence of Death ſhall be given upon any of the aforeſaid Offences, Execution cannot be awarded nor done, but by the Order of the Commander in Chief of that Fleet or Squadron, wherein Sentence of Death was paſſed.

XXVII. The Judge Advocate hath Power given by the words of the *Statute*, to adminiſter an Oath in order to the Examination or Trial of any of the Offences mentioned in the *Statute* of 13 *Car.* 2. *Cap.* 9. and in his abſence the *Court Marſhal* hath power to appoint any other Perſon to adminiſter an Oath to the ſame purpoſe. This *Statute* enlarges not the Power and Juriſdiction of the *Admiral* any further than only to the abovementioned Offences in any caſe whatſoever, but leaves his Authority as it was before the making of this *Statute*. Nor does it give the *Admiral* any other or further Power to enquire and puniſh any of the above-mentioned Offences, unleſs the ſame be done upon the main Sea, or in Ships or Veſſels being and hovering in the main Stream of great Rivers only beneath the Bridges of the ſame Rivers nigh to the Seas, within the Juriſdiction of the *Admiralty*, and in no other place whatſoever. 15 *R.* 2. *cap.* 3.

XXVIII. As Soldiers and Mariners for the Honour and Safety of the Realm, do daily expoſe their lives and limbs, ſo the Realm hath likewiſe provided for them, in caſe they ſurvive and ſhould prove diſabled or unfit for Service, a reaſonable and comfortable maintenance to keep them; the which the Juſtices of the Peace have power Yearly in their *Easter Seſſions* to raiſe by way of a Tax, for a weekly relief of maimed Soldiers and Mariners.

Stat. 43. *Eliz. cap.* 3. *& Vide* 13, 14. C. 2. *c.* 9. 7, 8 *W.* 3. *c.* 21. 2, 3. *A. c.* 6. whereby Proviſion is made for the Widows and Orphans.

The maimed Soldier or Mariner muſt repair to the *Treaſurer* of the County where he was preſt, if he be able to travel; if he be not, then to the *Treaſurer* of the County where he was born, or where he laſt dwelt by the ſpace of Three Years; but if he prove unable to travel, then to the *Treaſurer* of the County where he lands.

He muſt have a Certificate under the chief Commander, or of his Captain, containing the Particulars of his Hurt and Services.

The

The Allowance to one not having been an Officer, is not to exceed Ten Pound *per Annum*;

Under a Lieutenant——15 }
A Lieutenant——20 }

Till the Mariner arrives at his proper *Treaſurer*, they are to be relieved from *Treaſurer* to *Treaſurer*, and when they are provided for, if any of them ſhall go a begging or counterfeit Certificates, they ſhall ſuffer as common Rogues; and loſe their Penſions: Over and above this Proviſion, *His Sacred Majeſty* hath provided a further Suppliment for his maimed Mariners and Soldiers diſabled in the Service, which is iſſued out at the *Cheſt* at *Chatham*, and conſtantly and duly paid them; and for his Commanders, Officers, and others that ſerved abroad, he, of his Royal Bounty, hath given to thoſe that bear the Character of War, and purchaſe the ſame by their Fidelity and Valour, a pious Bounty called *Smart-Money*, over and above their Pay; and laid the Foundation of an *Hoſpital* at *Chelſea*, in his Life-time, which his now Sacred Majeſty hath compleated, and endowed, both for Beauty and Magnificence, excelling all in *Chriſtendom*.

The greateſt aſſurance of a Fleet is in the prudent Government of the *Admiral*; the greateſt weakning of it is by diſcontent, which generally proceeds from two things, want of good Victuals at Sea, and Pay when come home, theſe are the poor Mariners *Aqua vitæ*; but want of them is ſuch an *Aqua fortis* as eats through all manner of Duty and Obedience: That Prince that expects to be well ſerved and obeyed, (eſpecially by an *Engliſh* man) muſt take care that he ſuffer not a greater Power in his Fleet than his own; this Commander is Neceſſity, which breaks Diſcipline at Sea, and creates Diſcouragement at Land.

Vide Salmuth. In Pancir. Leg. rerum deperd. Cade. Triumph. Dion Halicarnaſ. lib. 5.

XXIX. The Wiſdom of the *Romans* was mightily to be commended, in giving of *Triumphs* to their *Generals* after their Return, of which they had various ſorts; but the greateſt was when the *General* rid in his Chariot, adorned and crowned with the Victorious Laurel, the *Senators* with the beſt of the *Romans* meeting him, his Soldiers (eſpecially thoſe who by their Valour had purchaſed Coronets, Chains, and other Enſigns of reward for their Conduct and Courage) following him: But what alas! could

could theſe to the more ſober repreſent any other but horror, ſince the Centers from whence the Lines were drawn, could afford nothing but Death, Slaughter and Deſolation on thoſe who had the Souls and Faces of Men; and if it were poſſible, that the Blood which by their Commiſſions was drawn from the ſides of Mankind, and for which they made thoſe Triumphs, could have been brought to *Rome*, the ſame was capable of making of a Source great as their *Tiber*; but *Policy* had need of all its Statagems to confound the Judgment of a Soldier by exceſſive Praiſes, Recompences and Triumphs, that ſo the Opinion of Wounds and wooden Legs might raiſe in him a greater Eſteem of himſelf, than if he had an entire Body. To allure others, ſomething alſo muſt be found out handſomly to cover wounds and affrightments of Death; and without this *Cæſar* in his Triumph, with all his Garlands and Muſick, would look but like a Victime; but what ſorrow of Heart is it to ſee paſſionate Man, a Ray of Divinity, and the Joy of Angels, ſcourged thus with his own Scorpions? and ſo fondly to give himſelf Alarms in the midſt of his innocent Contentments, as they of *Holland* but yeſterday in the midſt of their Traffick and Recreations did (by the denying *His Sacred Majeſty* his Right, even that Right of the Flag which his Anceſtors had with ſo much Glory acquired) pull on their heads a War, which that mighty *Republick* by their greateſt Induſtry and Wiſdom could not in the Revolution of almoſt Eight Years be able to quell. The cholerickneſs of War (whereby the luſtful heat of ſo many Hearts is reduced) ſtirs up the Lees of *Kingdoms* and *States*, as a Tempeſt doth weeds and ſlimy ſediment from the bottom to the top of the Sea, which afterwards driven to the Shore, together with its foam, there covers Pearls and precious Stones: and though the Cannon ſhould ſeem mad by its continual firing, and the Sword reeking hot by its daily ſlaughters, yet no good man doubts but they, even they, ſhall weather out thoſe Storms, and in the midſt of thoſe mercileſs Inſtruments find an *inculpata Tutela*, who love Juſtice, exerciſe Charity, and put their Truſt in the *Great Governour of all things*.

CHAP.

Chap. XIV.

Of Salutations by Ships of War, and Merchant Men.

I. Of Salutations, how eſteemed by ſome in this latter Age.
II. Of the ſame paid in all Ages as an undoubted mark of Soveraignty of this Empire.
III. Of thoſe Seas where this Right is to be paid to the King of England's Flag.
IV. In what manner the King of England holds this Right, and by whom to be paid.
V. Of thoſe that ſhall neglect or refuſe to do the ſame, how puniſht and dealt withal.
VI. Where His Majeſty of Great Britain's Ships are to ſtrike their Flag, and where not.
VII. Of the ſaluting of Ports, Caſtles, Forts, how the ſame is to be done, and on what terms.
VIII. Of Ships of War their ſaluting their Admiral and Commanders in Chief.
IX. Of Embaſſadors, Dukes, Noblemen, and other Perſons of Quality, how to be ſaluted coming aboard and landing.
X. The Admiral of any Foreign Nation, if met withal, how to be ſaluted and anſwered.
XI. Of the Men of War or Ships of Trade of any Foreign Nations, ſaluting His Majeſty's Ships of War, how to be anſwered.
XII. Of the ſaluting of His Majeſty's own Forts and Caſtles, and when the Salute ceaſes.
XIII. Of the Objection that ſeems to be made againſt the neceſſity of ſuch Salutations.
XIV. Why Kingdoms and States attribute the effects, not the cauſe of Rights, to preſcription.
XV. That Kingdoms and Republicks ought not to be diſordered for the defect of Right, in preſumption, and the objection in the XIII. §. anſwered.
XVI. The inconvenience of War, and the cauſes juſtifying the ſame.
XVII. Of the cauſes not juſtifiable in War.
XVIII. Of Moderation, and the utility of Faith and Peace.

I. AS reforming Powers in all Ages have made it their chiefeſt work to take down the great *Coloſſuſes*, and whatever elſe might be obumbrageous in the excreſcences of Civil Pomp; ſo we had ſome in this Age, who, by a new art of levelling, thought nothing could be rightly mended, and they planted, unleſs the whole piece ravelled out to the very end, and that all intermediate greatneſs between Kings and them, ſhould be crumbled even to the duſt, where all lying level together as in the firſt Chaos, Spades ought even to be put into the hands of thoſe

hoſe who were heretofore adorned with Scepters, all outward Tokens of honour and eſteem, which even from the firſt inſtitution of Society ſeemed by an uninterrupted ſtream to be continued down to Poſterity, (even amongſt the moſt barbarous Nations) was by them totally denied; the Hand, the Hat, the Knee (being no other but outwards ſigns of an inward reſpect) being eſteemed equal with *Idolatry*; but that unhappy brood, to whom whatſoever was crooked ſeemed ſtraight, and what was dark to them appeared light, are now not to be accounted Men, with whom the Queſtion may admit of a Debate, whether *Salutation* is innocent, neceſſary, and praiſe worthy, ſince nothing of reaſon can be found in the Foundation of their Religion, Honeſty or Conſcience,—— Therefore this Diſcourſe is directed to Men.

II. Firſt, it is evident by what hath been ſaid, that the *Britiſh Seas* before the *Roman Conqueſt*, ever belonged to the *Iſle of Great Britain*, they always claiming and enjoying the ſole Dominion and Sovereignty of the ſame, which afterwards accrued to the *Romans* by Conqueſt, and from them tranſlated with its *Empire* to the ſucceeding *Saxon*, *Daniſh*, and *Norman* Kings; and in the Reigns of thoſe Princes there were always ſome marks of Sovereignty paid, wherein the right of the ſame was evinc'd and acknowledged.

III. Now thoſe Seas in which this Salutation or Duty of the Flag are to be paid, are the four circumjacent Seas, in which all Veſſels whatſoever are to pay that Duty, according to the Cuſtom of the ſame, and the Ordinance of King *John*. How far this Right is payable, appears in the Fourth Article in the Peace made lately between *His Majeſty* and the *States General of the United Provinces*, in theſe words:

——That whatever Ships or Veſſels belonging to the ſaid United Provinces, whether Veſſels of War or other, whether ſingle or in Fleets, ſhall meet in any of the Seas from Cape Finiſterre the middle point of the Land Van Staten in Norway, with any Ships or Veſſels belonging to his Majeſty of Great Britain, whether thoſe Ships be ſingle or in great number, if they carry his Majeſty of Great-Britain's Flag or Jack, the aforeſaid Dutch Veſſels or Ships ſhall ſtrike their Flag and lower their

Top-ſail, in the ſame manner, and with as much reſpect as hath at any time, or in any place, been formerly practiſed, towards any Ships of his Majeſty of Great Britain, or his Predeceſſors, by any Ships of the States General, or their Predeceſſors.

IV. Now his Majeſty holds not this *Salutation* or Reſpect, by virtue of the League of the Article, but as the ſame is a RIGHT inherent to the *Empire of Great Britain*; and therefore in the firſt part of the Article it is declared in theſe Words:

——That the aforeſaid States General of the United Provinces, in due acknowledgment on their part of the King of Great Britain's RIGHT to have his Flag reſpected in the Seas hereafter mentioned, ſhall and do declare, and agree.——

Now this Right extends and ſubjects all Nations whatſoever that ſhall paſs through thoſe Seas, and between thoſe Places meeting with any of his Majeſty's Ships of War, bearing his Flag, Jack, or Cognizance of Service, to ſtrike their Top-ſail, and take in their Flag in acknowledgment of his *Majeſty*'s Sovereignty in thoſe Seas; and if any ſhall refuſe to do it, or offer to reſiſt, they may be compelled *vi, & manu forti*, for his *Majeſty*'s Honour is by no means to receive the leaſt Diminution.

Selden Mare Clauſe lib. 2. cap. 23.

V. If therefore any of His *Majeſty*'s Subjects ſhould be ſo negligent or forgetful to pay that Obedience, when it may be done without loſs of the Voyage, they are to be ſeized on, and brought to the Flag, to anſwer the Contempt; or elſe the *Commander* may remit the Name of the Ship, *Commander* or *Maſter*, as alſo the Place from whence, and the Port to which ſhe ſhall be bound, to the *Admiral*; however, before ſhe is diſmiſt, ſhe muſt pay the Charge of the *Shot* that her Negligence or Forgetfulneſs occaſioned, and afterwards may be indicted for the ſame, and ſeverely puniſhed.

VI. In His Majeſty's Seas, none of his Ships of War are to ſtrike to any; and in no other Part is any Ship of His Majeſty to ſtrike her Flag or Top-ſail to any Foreigner, unleſs ſuch Foreign Ship ſhall have firſt ſtruck, or at the ſame time have ſtruck her Flag or Top-ſail to his Majeſty's Ships.

VII. But if any of the King of *England*'s Ships of War, ſhall

ſhall enter into the Harbour of any Foreign Prince or State, or into the Road within ſhot of Cannon of ſome Fort or Caſtle, yet ſuch Reſpect muſt be paid, as is uſually there expected, and then the *Commander* is to ſend aſhore to inform himſelf what return they will make to his Salute; and that if he hath received good Aſſurance, that his Majeſty's Ships ſhall be anſwered Gun for Gun, the Port is to be ſaluted, as is uſual; but without aſſurance of being anſwered by an equal number of Guns, the Port is not to be ſaluted: And yet in that very reſpect before the Port is to be ſaluted, the Captain ought to inform himſelf, how Flags (of the ſame quality with that he carries) of other Princes have been ſaluted there, the which is peremptorily to be inſiſted on, to be ſaluted with as great Reſpect and Advantage as any Flag (of the ſame quality with the Captains) of any other Prince hath been ſaluted in that place.

VIII. A Captain of a Ship of a ſecond Rate, being neither Admiral, Vice-Admiral, nor Reer-Admiral, at his firſt coming and ſaluting his Admiral or Commander in Chief, is to give Eleven Pieces, his Vice-Admiral Nine, and his Reer-Admiral Seven, and the other proportionably leſs by two, according to their Ranks; but the Commander or Captain of a Ship is not to ſalute his Admiral or Commander in Chief, after he hath done it once, except he hath been abſent from the Flag Two Months. *Artic.* 38.

IX. When a Ship of the ſecond Rate ſhall carry any Embaſſador, Duke or Noblemen, at his coming aboard he is to give Eleven Pieces, and at his Landing Fifteen; and when he ſhall carry a Knight, Lady or Gentleman of Quality, at their coming aboard he is to give ſeven, and at their Landing eleven; and the other Ships are to give leſs by two, according to their Ranks and Number, of Ordnance.

X. When an Admiral of any Foreign Nation is met with, he is to be anſwered with the like Number by all the Ships he ſhall ſalute; if a Vice-Admiral, the Admiral is to anſwer him with twelve leſs; but the Vice-Admiral and Reer-Admiral, and as many of the reſt as he ſhall ſalute, ſhall give him the like number; if a Reer-Admiral, then the Admiral and Vice-Admiral to anſwer

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him with two leſs; but if he ſhall ſalute the Reer-Admiral or any other, they are to anſwer him in the like Number.

XI. When a Man of War or Merchant Man of another Nation, or of our own, ſalutes any of the King's Ships, he is to be anſwered by two leſs.

XII. When any of the Captains of his Majeſty's Ships ſhall have occaſion to ſalute any of the King's Caſtles, he is to give two Guns leſs than they are directed to give upon ſaluting their Admiral or Commander in Chief, as aforeſaid: But this extends only to time of Peace; for if War is begun, no Guns ought to be fired in Salutes, unleſs to the Ships or Caſtles of ſome Foreign Prince or State in Amity.

XIII. Thoſe Duties or Obligations being laid on *Commanders*, conſiſt of two parts; the one is that ancient preſcription, which the *Crown of England* claims by virtue of the Sovereignty of that *Empire*; the other is but that Reſpect which is paid as viſible Marks of *Honour* and *Eſteem*, either to Kingdoms or Perſons publick or private, to whom theſe ſeveral Commands are to be obſerved; and yet in theſe which are both innocent and harmleſs of themſelves, we want not thoſe, who being empty of all that may be called good, want not malice to ſtart up words, *Wherefore ſhould the Lives of Men, even* Chriſtian *Men, be expoſed to death and ſlaughter for ſhadows* (as they call them) *Right of Salutation* or Cmplement being no other in their Opinion.

XIV. Admitting therefore that the Evidence of original Compacts and Rights ſtand at ſuch remote diſtances from us, that they are hardly diſcernable, and that the principle of Civil things, as well as natural, is ſought for in a Chaos or Confuſion; ſo that the Evidence of ancient facts *veſtigia nulla retrorſum*, there being no infallible marks of their pre-exiſtence (one ſtep doth ſo confound and obliterate another) and that time it ſelf is but an imagination of our own, an intentional, not a real meaſure for actions, which paſs away concomitantly with that meaſure of time in which they were done, for which reaſon we talk of ancient things, but as blind Men do of Colours: Notwithſtanding preſcription is ſuppoſed by moſt to hold out ſuch an Evidence, that as they ſay, it ought

Coke Comm. on *Littleton*, *fol.* 113, 114.

to

to ſilence all Counterpleas in all Tribunals, and by the preſent allowance which is indulged to it, it either proves a good or cleanſes a vitiated Title; and hath this power in the civil Conſtitution of the World, that for Quietneſs ſake what it cannot find, we grant it a power to make.

And if we examine all this ſtrictly at the two great Tribunals, the external and the internal, and argue the *Jus* of it, as Stateſmen and Lawyers do, we can then raiſe the Argument of it no higher in the external or temporal Court, than only this —— *That it is very convenient it ſhould have the effects of Right; leſt Properties and Dominion of things ſhould be uncertain, and the apparent negligences of Time: Owners ſhould be puniſhed, and Controverſies have a ſpeedy end:* States looking more after publick repoſe and quiet than after ſtrickt Virtue; and more after thoſe things which are *ad alterum*, than that which concerns a Man's own ſelf; for, ſay they, *The Gods look well enough after their own Injuries:* States meddle not ſo much with great Prodigalities as in petty Larcenies, *our chiefeſt Liberty, Priviledges, or Prerogative in this World, conſiſting only in an uncontroulable Right, which we have to undo our ſelves, if we pleaſe.* Certainly if we plead at the other *Tribunal*, as conſcientious Lawyers, we muſt give our ultimate Reſolution out of that Law, *Quæ inciditur don ære, ſed animis:* which is not engraved in Tables of Braſs, but in the Tables of our Souls; for the Rules of Law tells us, *Quæ principio vitiantur, ex poſt facto reconvaleſcunt*, and that preſcription or uſu caption (which is but the lapſe of ſo much Time) hath the power to make *Wrong a Right*; yea, to change the morality of an Action, and turn Quantity into Quality: Upon the Reſult of all which taking for granted, what thoſe ſtubborn People do hold, that inſtead of being a right, or a certain Cauſe or Proof of it, it only makes a ſhadow or an opinion of right.

Deorum injuria Diis curæ.

XV. And when we have taken thoſe People by the hand, and with eagerneſs run with them to the very bottom and end of the line, and there find nothing, we are but in *Pompey's* Aſtoniſhment, when after his Conqueſt of *Jeruſalem*, having with ſuch reverence and curioſity viſited the *Sanctum Sanctorum*, and found no-

thing there but a pair of Candleſticks and a Chair, in which there was no God ſitting; yet for all this Miſtake, he would not (as *Joſephus* ſaith) diſorder or rob the Temple, which he took by force of Arms, becauſe *the very Opinion of Religion hath ſomething of Religion*; (which made *Jacob* accept of *Laban*'s Oath by an *Idol*) ſo ought not we for defect of giving the Cauſes of the Inception of Preſcription, or of the Right in Preſcription diſorder a State or be the occaſion of ſetting of two Nations at enmity; nay, though in Conſcience we are ſatisfied that it contains but the Opinion or Shadow of Right: And as to the involving the Lives of the Innocent, there is no ſuch thing in the matter, for there is not required any thing which they do not owe, nor are they deſigned to Death; but if the Cauſe be ſuch, that they that are Innocent muſt periſh, that is, be expoſed to Death by their Rulers becauſe they obſtinately will not yield that which is right, but will involve the Lives of their innocent Subjects by Force, to defend that which is wrong, ſuch guilty Governours muſt anſwer for the Defect of their own evil Actions: on the other hand, there can be no doubt made, but he that hath an undoubted Right, being a Sovereign, the Subjects partake in the ſame, and the Indignity offered to him, they immediately become Partakers in the Suffering, for the Satisfaction of which they may, yea, are obliged both by the Law of God and Nations to ſeek Reparation (if their Prince ſhall command) *vi, & manu forti*, by the Hazard of their Blood and Lives.

Matchiavel's Diſcourſes, *cap.* 11.

XVI. on the other Hand, as War introduces the greateſt of Evils, *viz.* the taking away of Men's Lives, and that which is equivalent to Life; ſo right Reaſon and Equity tells us, that it ought not to be undertaken without the greateſt Cauſe, which is the keeping of our Lives, and that without which our Lives cannot be kept; or if they ſhould be kept, yet they would not be of any value to us, ſeeing there may be a Life worſe than Death, even Captivity; wherefore as we are forbidden to go to Law for a little Occaſion, ſo we are not to go to War but for the greateſt. Now thoſe things that are equivalent to a Man's Life, are ſuch to whom *Almighty God* appointed the ſame equal Puniſhment as to Murderers, and ſuch were breakers into Houſes, breakers of Marriage-fidelity, Publiſhers

ers of falſe Religion, and thoſe who rage in unnatural Luſts, and the like.

However, before Men's Perſons or Goods are to be invaded by War, one of theſe three Conditions is requiſite.

1. Neceſſity, according to the tacite Contract in the firſt dividing of Good, as hath been already obſerved.

2. A Debt.

3. A Man's ill Merits, as when he doth great Wrong, or takes part with thoſe who do it.

Againſt which if any thing is committed, War may be commenc'd nor is the ſame repugnant to the Laws of Nature; that is, whether the thing may be done not unjuſtly, which hath a neceſſary Repugnance to the rational and ſocial Nature; amongſt the firſt Principles of Nature, there's nothing repugnant unto War; on the other hand there is much in favour of it, for both the end of War, the Conſervation of Life and Members, and the keeping and acquiring of things uſeful unto Life, is moſt agreeable to thoſe Principles; and if need be, to uſe Force to that Purpoſe is not diſagreeable, ſince every living thing hath by the Gift of Nature Strength, to the end it may be able to help and defend it ſelf. Beſides, Reaſon and the Nature of Society, inhibits not all Force, but that which is repugnant to Society, that is, which depriveth another of his Right; for the end of Society is, that every one may enjoy his own; this ought to be, and would have been, though the Dominion and Property of Poſſeſſions had not been introduced; for Life, Members and Liberty would yet be proper to every one; and therefore without Injury could not be invaded by another: To make uſe of what is common, and ſpend as much as ſuffices Nature, would be the right of the Occupant, which Right none could without Injury take away. And this is proved by that Battle of *Abraham* with the four Kings, who took Arms without any Commiſſion from GOD, and yet was approved by him; therefore the Law of Nature was his Warrant, whoſe Wiſdom was no leſs eminent than his Sanctity, even by report of *Heathens*, *Beroſus* and *Orpheus*; nor is the ſame repugnant to the *Hebrew*

Ulpian Leg. 1. *Sect. vim. vi. D de vi, & vi arma.*

brew Law or *Goſpel*, as the ſame is moſt excellently proved by the *Incomparable Grotius* *.

* *De Jure Belli ac Pacis, lib.* 1. *cap.* 1.

XVII. On the other hand, the Fear of uncertain Danger, as building of Forts, Caſtles and Ships, and the like, though the former be on Frontiers, the refuſing of Wives (when others may be had) the changing of Countries either Barren or Mooriſh for more fertile or healthful which may juſtly be done: As in the Caſe of the old *Germans*, as *Tacitus* relates: So likewiſe to pretend a Title to a Land, becauſe it was never found out or heard of before; that is, if the ſame be held by a People that are under a Government; nay, though the Government be wicked or think amiſs of GOD, or be of a dull Wit; for Invention is of thoſe things that belong to none; for neither is moral Virtue, or Religion, or Perfection of Underſtanding required to Dominion; but yet if a new Place or Land ſhall be diſcovered, in which are People altogether deſtitute of Reaſon, ſuch have no Dominion, but out of Charity only is due unto them what is neceſſary for Life; for ſuch are accounted as Infants or Mad-men, whoſe Right or Property is transferred, that is, the uſe of the ſame, according to the Law of Nations; in ſuch Caſes a charitable War may be commenc'd.

Victor. de Ind. rel. 1. *n.* 31.

Victor de Jure Belli n. 5, 6, 7, 8.

XVIII. To prevent all the ſad Calamities that muſt inevitably follow the ungoverned Hand in War, Faith muſt by all Means be laboured for; for by that, not only every Common Wealth is conſerved, but alſo that greater Society even of Nations, that once being taken away, then farewel Commerce, for that muſt be then taken away from Man; for Faith is the moſt Sacred thing that is ſeated in the Breaſt of Man, and is ſo much more religiouſly to be kept by the ſupreme Rulers of the World, by how much more they are exempted from the Puniſhment of their Sins here than other Men: Take away Faith, and then Man to Man would be (as Mr. *Hobbs* obſerves) even Wolves; and the more are Kings to embrace it, firſt for Conſcience, and then for Faith and Credit ſake, upon which depends the Authority of their Government. The Ambaſſadors of *Juſtinian* addreſſed their Speech to *Choſroes* after this manner: *Did we not ſee you here with our own Eyes, and pronounce thoſe Words in your Ears, we ſhould never have believed that* Choſroes *the Son of* Cabades,

Procopius Perſic. 2.

Cabades, *would bring his Army, and enter forcibly into the* Roman *Bounds, contrary to his Leagues, the only Hope left to thoſe that are afflicted with War? For what is this, but to change the Life of Men into the Life of wild Beaſts? Take away Leagues, and there will be eternal Wars, and Wars without end will have this Effect, to put Men beſides themſelves, and diveſt them of their Nature.* If then a ſafe Peace may be had, it is well worth the releaſing of all or many Injuries, Loſſes, and Charges, according to that in *Ariſtotle: Better it is to yield ſome of our Goods to theſe that are more Potent, than contend with them and loſe all;* for the common Chances of War muſt be conſidered, which if ſo, the Scope of the principal part of this Firſt Book may be avoided, and we let into the peaceable Tract of Traffick and Commerce.

The End of the Firſt Book.

BOOK.

BOOK II.

CHAP. I.

Of the various Rights and Obligations of Owners and Partners of Ships in Caſes private.

I. Of Navigation *in general.*
II. Of Owners *their ſeveral Powers over thoſe Veſſels they are Partners in. Trover for a part of a Ship.*
III. *Where Ships are oblig'd to make a Voyage before they can be ſold; and what may be done when part proteſt againſt a Voyage.*
IV. *The Maſter how brought in by the Owners, and the reaſon why in ſuch a manner.*
V. *Where the Owners ought to be repaired for the Damages of the Maſter.*
VI. *Where Ships broke in pieces determine the Partnerſhip as to the Veſſel, and where not.*
VII. *Where a Ship ſhall be the Builders, and where only his, whoſe Materials ſhe was erected with.*
VIII. *Where Property of the Veſſel altered changes not that of the Boat.*
IX. *A Ship for the act of Piracy becomes forfeited; yet if* bona fide *ſold, where the Property may be queſtioned.*
X. *Monies borrowed by the Maſter, where the ſame obliges the Owners, and where not.*
XI. *Where he that obtains an unlawful poſſeſſion of a Ship, ſhall anſwer the full Freight to the Owners,*
XII. *And where the Owners ſhall have their Freight, though they loſe their Lading.*
XIII. *Where a Ship may become a Deodand, and where not. Not forfeited till Condemnation.*
XIV. *How recoverable by the Laws of* England.
XV. *Foreign Ship naturaliz'd upon ſale needs not to make Oath again upon the New Act.*

I. IN the precedent Book having obſerved ſomething of the Rights of Perſons and of Things in a ſtate of *Nature*, and how neceſſarily they came at firſt to be appropriated and how equitably they are now continued in the poſſeſſion of thoſe to whom they are conſigned by the *donation* of others, by the *Laws of Nations*, and maintained or deſtroyed by the equity of thoſe various Laws which

which rules and governs them in reference to matters *publick*, all which is juſtified by the Scripture it ſelf: It may not now ſeem improper to examine the *private cauſes* changing the ſame, and of the contingencies and advantages that wait on that which we properly call Commerce.

The Great Creator having finiſhed his Mighty Work, and given Man that Dominion which he now enjoys, as well over the Fiſh in the Seas, as the Beaſts in the Field, he was not forgetful of beſtowing on him thoſe things which were neceſſary for the Government and ſupport of the ſame, creating at the ſame time Trees which grow as it were ſpontaneouſly into Veſſels and Canoos; which wanted nothing but launching forth to render them uſeful for his accommodation, which afterwards he by his Divine Genius (inſpired by that Mighty One) finding Materials, hath ſince ſo compleated and equipt, as to render it the moſt beautiful and ſtupendious Creature (not improperly ſo called) that the whole World can produce, which being not retarded by lett of Winds, or other contingent accidents, ſubmits it ſelf to plow the unknown paths of that vaſt Element, to brave all Encounters of Waves and Rocks, to fathom and ſurvey the vaſt immenſities of the very World it ſelf, to people, cultivate, and civilize uninhabited and Barbarous Regions, and to proclaim to the Univerſe the Wonders of the *Architect*, the Skill of the *Pilot*, and above all the Benefits of *Commerce*; ſo that it is no wonder at this day to find Nations contending who ſhould ſurpaſs each other in the Art of Navigation, and to monopolize if poſſible, the very Commerce and Trade of the World into their hands; and that, all by the means of this moſt excellent Fabrick.

II. Hence it is, that Ships and Veſſels of that kind being originally invented for uſe and profit, not for pleaſure and delight, to plow the Seas, not to lie by the Walls, to ſupply thoſe of the Mountains as well as thoſe on the Sea Coaſts.

Aretin poſt Joan. Faber. in §. item exercitor. num. 3. Inſt. de oblig. quæ ex quaſi delict.

Therefore upon any probable deſign the major part of the Owners may even *againſt the conſent*, though not without the *privity* and knowledge of the reſt, freight out their Veſſel to Sea.

If

If it ſhould ſo fall out that the major part *proteſt* againſt the Voyage, and but one left that is for the Voyage, yet the ſame may be effected by that party, eſpecially if there be *equality* in Partnerſhip.

As an incouragement to the Building of Ships being of that univerſal Advantage to the Publick in point of Trade, and Commerce, to contrive and veſt the Owners propriety in them, both by the Common Laws of this Realme, and the Maritime Laws, it is provided that in caſe a Ship be taken away or the Owners diſpoſſeſt, they may maintain an Action of Trover and Converſion for an 8th, a 16th, or any other Part or Share of the ſame.

Tenants in Common of a Ship.

In an Action on the Caſe, the Plaintiff declared that he was Owner of the 16th part of a Ship, and the Defendant Owner of another 16th Part of the ſame Ship, and that the Defendant fraudulently and deceitfully carried the ſaid Ship *ad loca tranſmarina*, and diſpoſed of her to his own uſe, by which the Plaintiff loſt his 16th part to his damage, on not guilty pleaded, and verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action did not lye, for tho' it be found deceptive, yet this did not help it, if the Action did not lye on the ſubject matter. And here they are Tenants in Common of the Ship, and by *Littleton* between Tenants in Common there is not any Remedy, and there cannot be any fraud between them, becauſe the Law ſuppoſes a truſt and confidence betwixt them; and upon theſe Reaſons Judgment was given *quod Querens nil capiat per billam*. *Graves* againſt *Sawcer*, *Raym.* 15. 1 *Levinz.* 29. and 1 *Keeble* 38. 3 *Leon.* 228. *Bennington* againſt *Bennington*.

Litt. §. 323. 1 *Inſt.* 199. *b.* 200. *a.* *Salk.* 290, 392.

Leg. Fin. C. §. *pro Socio & poſs. inſt. & D. eod. Leg. in hoc parag. ſi conveniat pro Sco.*

III. Owners by Law can no ways be obliged to continue their paction or partnerſhip without ſundering; but yet if they will ſunder, the *Law Marine* requires ſome conſiderations to be performed before they can ſo do. And therefore if the Ship be newly built, and never yet made a Voyage, or is newly bought, ſhe ought to be ſubject to one Voyage upon the common out-read and hazard, before any of the Owners ſhall be heard to ſunder and diſcharge their parts; but by the Laws of *England* the Owners may before any ſuch Voyage, ſell or tranſmit their Right.

If it falls out that one is ſo obſtinate that his conſent cannot be had, yet the Law will enforce him either to hold, or to ſell his proportion; but if he will ſet no price, the reſt may out-rigg her at their own coſts and charges, and whatſoever Freight ſhe earns, he is not to have any ſhare or benefit in the ſame. But if ſuch Veſſel happens to miſcarry or be caſt away, the reſt muſt anſwer him his part or proportion in the Veſſel.

Bart. & Paul. in Leg. hæc diſtinctio §. cum fundum ff. locat.

Such Veſſels when freighted out againſt the grain of ſome of the Part-Owners, the ſame is under ſuch Proviſoes, Cautions and Limitations as the Law in that caſe requires.

But if it ſhould fall out that the major part of the Owners refuſe to ſet out the Veſſel to Sea, there by reaſon of the unequality they may not be compelled; but then ſuch Veſſel is to be valued and ſold: The like where part of the Owners become deficient or unable to ſet her forth to Sea.

Gloſs Leg. ſinavis & juris in Leg. utq; paræ: culpæ derci undic & Leg. arboribus. §. navis de uſufruct.

IV. The Maſter of the Veſſel is eligible by the Part-Owners in proportion, not by the majority, and he that is moſt able is to be preferred. The Wiſdom of the latter Ages have been ſuch; that few have gone out in that condition, but thoſe that have commonly had ſhares or parts in the ſame Veſſel. In the preferring therefore of a Maſter, his ability and honeſty is to be conſidered, ſince on him reſts the charge not only of the Veſſel, but of the Lading; their very actions ſubjecting the Owners † to anſwer for all damage that ſhall be ſuſtained by him or his Mariners, be it in the Port or at Sea, to the Lading or Goods of the Merchant or Laders, and they are made liable as well by the Common Laws * of *England*, as the Law † Marine.

Leg. non aliter F. de uſu & habei.

† *Coke* 4 *Inſtit.* 146.

18 *H.* 8. *n.* 58.

* *Hill.* 23 *Car.* 2. *B. R. Morſe verſus Slue.*

† *Nautæ Caup. Stab. Leg.* 1. *Sect.* 3.

V. If the Maſter commits offences either negligently or wilfully, he ſhall be reſponſible over to his Owners for the reparation of damage; nor are they bound to joyn, but may ſever and ſue apart as well by the *Common Law* * as the Marine: So likewiſe if the Ship hath earned Freight, and part of them receive their parts, the reſt may bring their Action for their ſhare without joyning with the others.

* *Hill.* 26, 27. *Car.* 2. *in B.R. Stanley verſus Ayles.* 3 *Keeble.* 444.

The

Maſter and Owners reſponſable.

The Defendant and ſeven other Perſons were proprietors of a Ship, in which Goods were uſually tranſported for hire, and the Plaintiff *onerat* Goods upon the Ship to be carried for hire, from *London* to *Topſham* in *Comitatu Devon*, and that the Defendant received them, and undertook to bring them to *Topſham*, but that he not being careful of his Duty but neglecting it ; *tam improvidenter* placed and carried the ſaid Goods, that tho' the Ship ſafely arrived at *Topſham*, yet the Goods were ſpoiled. And upon *non culp.* pleaded. The Jury found a ſpecial Verdict, *viz.* That the Defendant and ſeven other Perſons were Proprietors and Part-Owners of the Ship, that the Ship had a Maſter *locat* in her by the Part-Owners who had 60 *l.* Wages for every Voyage between *Topſham* and *London*, that the Goods were delivered to the Maſter none of the Part-Owners being preſent, and that there was not any Contract made with them or any of them by the Plaintiff, that the Ship arrived ſafe to *Topſham* but the Goods were ſpoiled. *Et ſi pro Quer, pro Quer ſi non pro* Def.

And two points were made.

1. If the Proprietors are chargeable no Contract being made with them, and there being a Maſter that is chargeable in reſpect of his Wages, according to the Caſe of *Mors* and *Slue*, yet *per Holt Ch. Juſtice* clearly, that tho' the Maſter be chargeable in reſpect of his Wages, ſo are the Proprietors in reſpect of their Freight that they receive for the carriage of the Goods at the Election of the Plaintiff.

2. If the Action lay againſt the Defendant alone, it appearing that there are other Part-Owners not made Defendants, and held that the Action did not lye againſt him ſole, but ought to have been againſt all the Part-Owners, for all the Part-Owners are chargeable in reſpect of the Profit they make by the carriage of the Goods, and that in point of Contract upon their undertaking, be it implyed or expreſs, and are not chargeable as Treſpaſſers, for then one might be chargeable alone, but in point of Contract upon their Receipt of the Goods to be carried for hire. Judgment *pro Defen.* as by 3 *Mod.* 321. *Boſon con. Sanford* 3 *Levinz.* 258. where it

it is with a *Cur. adviſare, ines le Reporter ut audivit* Judgment *pro Defen.*

VI. If a Ship be broken up or taken in pieces, with an intent to convert the ſame to other uſes; if afterwards upon advice or change of mind, ſhe be rebuilt with the ſame Materials, yet this is now another, and not the ſame Ship, eſpecially if the Keel be ript up or changed, and the whole Ship be once all taken aſunder and rebuilt, there determines the Partnerſhip *quoad* the Ship. But if a Ship be ript up in parts, and taken aſunder in parts, and repaired in parts, yet ſhe remains ſtill the ſame Veſſel and not another; nay though ſhe hath been ſo often repaired that there remains not one ſtick of the Original Fabrick.

Leg. inter ſtipulantem in §. *Sacram ff. de ver. oblig.*

Leg. quid in §. *fin. F. de Leg.*

VII. If a Man ſhall repair his Ship with Plank or other Materials belonging to another, yet the Ship maintains and keeps her firſt Owners.

Leg. Muſius ff. de rei vendic.

But if a Man take Plank and Materials belonging to another, and prepared for the uſe of Shipping, and with them build a Ship, the property of the Veſſel follows the Owners of the Materials and not the Builder.

ff. lib. 6. tit. 1. leg. 61.

But if a Man cut down the Trees of another, or takes Timber or Planks prepared for the erecting or repairing of a dwelling-Houſe; nay, though ſome of them are for ſhipping, and builds a Ship, the Property follows not the Owners but the Builders.

Leg. ſi ex meis, ff. de acq. rer. dom. & Leg. ſi convenerit §. *ſi quis ſic. ff. de pign. act.*

VIII. If a Ship be ſold together with her Tackle, Furniture, Apparel, and all other her Inſtruments thereunto belonging, yet by theſe words the Ships Boat is not conveyed, but that remains ſtill in the Owners; ſo it is if the Ship be freighted out, and afterwards at Sea ſhe commits Piracy: The Ship is forfeited, but the Boat remains ſtill to the Owners †.

Leg. Marcellus in §. *armamenta. ff. de rei vindicat.*

† *Trin. 3. Jac. B. R.* Rolls 1. part Abridg. *fol. 530. Bald. in Leg. cum proponas Cod. de. Nautic. è fœnore, num. 6.*

And though Ballaſt is generally uſed in Shipping by thoſe Ships that are freighted outwards, in order to bringing home of Goods, yet is not the ſame any part of the Furniture of the Veſſel; and ſo it was adjudged in debt on Bond the Condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if the Plaintiff ſhall enjoy the

the ſaid Ship with all the Furniture belonging to the ſame, without being diſturbed for the Ship or any Furniture appertaining to it, that then, *&c.* and the caſe fell out to be, that after the ſale of the Ship, a ſtranger ſued the Plaintiff for certain monies due for Ballaſt bought by the Defendant for the ſame Ship, in which Suit he obtained Sentence, upon which the Ship was ſeized, the Queſtion was, If Ballaſt be Furniture for a Ship or not; it was reſolved that it was not; for though it may be as neceſſary as Sails, yet it is not always ſo, for ſometimes they ſail without Ballaſt, for the Merchandize it ſelf may be ſufficient to anſwer that purpoſe.

Mich. 29 *Eliz. in C. B. Lister*'s Caſe, *Leon.* 46, 47.

IX. If a Ship commits a Piracy, by reaſon of which ſhe becomes forfeited, if before ſeizure ſhe be *Bona fide* ſold, the property ſhall not be queſtioned, nor the Owners diveſted of the ſame.

Mich. 13 *Jac. in B. R.* Sir *Rich. Bingley*'s Caſe, Rolls Abridg. *fol.* 530.

X. If a Maſter ſhall take up Monies to mend or victual his Ship where there is no occaſion, (though generally the Owners ſhall anſwer the fact of the Maſter) yet here they ſhall not, but only the Maſter. But if there were cauſe of mending the Ship, though the Maſter ſpend the Money another way, yet the Owner and Ship become liable to the ſatisfaction of the Creditor; for it were very unreaſonable that the Creditor ſhould be bound to take upon him the care of repairing the Ship, and ſupply the Owners room, which muſt be ſo, if it ſhould be neceſſary for him, to prove that the Money was laid out upon the Ship; ſo on the other hand, it ſtands with reaſon that he be ſure that he lends his Money on ſuch an occaſion as whereby the Maſters fact may oblige the Owners, which he cannot do otherwiſe, unleſs he knows that the money borrowed was neceſſary for the repair of the Ship; and therefore if the Ship wanted ſome repairs, and a far greater and more extravagant ſum was lent than was needful, the Owners ſhall not be liable for the whole.

Dig. lib. 14. *tit.* 1. §. 17.

Bridgman's Caſe, *Hobart*, *fol.* 11. 12. *Moo.* 918.

Gloſſ. Afritan. ſuper eod. leg. & §.

XI. If a man gets poſſeſſion of Ship having no Title to the ſame, by the Law Marine, he ſhall anſwer ſuch damage as the Ship in all probability might have earned; and the reaſon of that is, becauſe the only end of Shipping, is the imployment thereof: but if a Warrant be directed out of the *Admiralty* to the *Marſhal* of the ſame Ship, to arreſt ſuch a Ship and *Salvo Cuſtodire*, who by force of the ſame

Dig. lib. 6. *tit.* 1. 62. *& lib.* 7. *tit.* 1. 12. §. 1. *& Papinian* on the ſame Law.

enters

enters into the ſame Ship, though the Warrant does not mention that the Officer ſhould carry away the Sails of the ſame Ship, yet he may juſtifie the taking the ſame, for that he cannot *Salvo Cuſtodire* the ſame Ship, unleſs he carries away the Sails. *Mich. 2 Car. in B. R. Creamer verſus Jockley, Latch. fol. 188.*

XII. A Ship is freighted out, accordingly ſhe receives in her Lading purſuant to agreement, afterwards an Embargo happens, and the Lading is taken as forfeited, yet the Owners ſhall notwithſtanding receive Freight, for here is no fault in them, but only in the Merchant. *Digeſt. lib. 19. tit. 2. 61. Scævola* on the ſame Law.

XIII. In *Aqua dulci* a Ship may become a Deodand, but in the Sea, or in *Aqua ſalſa*, being an Arm of the Sea, no Deodand of the Ship or any part of it, though any body be drowned out of it, or otherwiſe come by their death in the Ship, becauſe on ſuch waters, Ships and other Veſſels are ſubject to ſuch dangers upon the raging waves in reſpect of Wind and Tempeſt; and this diverſity all our ancient Lawyers do agree in, and it does more eſpecially appear in the Parliament Rolls, whereupon a Petition it was deſired, *That if it ſhould happen that any Man or Boy ſhould be drowned by a fall out of any Ship, Boat, or Veſſel, they ſhould be no Deodands*: Whereupon the King by great advice with his Judges and Council learned in the Laws, made anſwer, *The Ship, Boat or Veſſel, being upon the Sea ſhould be adjudged no Deodand, but being upon a freſh River it ſhould be a Deodand*—— but the King will ſhew favour. There are abundance of other Petitions upon the like occaſion in Parliament. *3 Inſt. fol. 58. Rot. Parliam. 51 Ed. 3. num. 73. 1 R. 2. n. 106. 4 R. 2. n. 33. 1 H. 5. n. 35.*

A Ship lying at *Redrith*, in the County of *Kent*, near the ſhore to be careen'd and made clean, it happened that one of the Shipwrights being at work under her at low Water, the Veſſel (then leaning aſide) fortuned to turn over the contrary ſide, by means of which the Shipwright was killed: Upon a Tryal at Bar, where the Queſtion was, Whether this Deodand did belong to the Earl of *Saliſbury*, who was Lord of the Mannor, lying contiguous to the place where the Man was ſlain, or to the Almoner as a matter not granted out of the Crown? In that caſe it was reſolved, That the Ship was a Deodand, and the Jury thereupon found a Verdict for the Lord of *Saliſbury*, that the ſame did belong to his Mannor. *Mich. 29 Car. 2. in B. R.*

P On

Vide 1 Ven. 47. 1 Sid. 421. 1 Mod. 18.

On Importation of prohibited Goods, the Ship cannot be ſeiz'd as forfeit till a Condemnation in the Exchequer thereon. *Horne* againſt *Ivye* 2 *Keeble* 604.

XIV. Thus Men from their neceſſity and ſafety having from hollow Trees, nay Reeds, Twigs and Leather (for ſuch were the rude beginnings of thoſe ſtupendious things we now admire) advanced the Art to that degree, as to render it now the moſt uſeful thing extant; and as the Mathematicks, Aſtronomy and other Sciences have added to its ſecurity, ſo have ſucceeding Ages from time to time, provided priviledges and Laws by which it hath alwas been regulated and governed, the which upon all occaſions, and in all Courts have generally had a genuin conſtruction as near as might be to the Marine-Cuſtoms; and therefore at this day, if a Ship be taken away, or the Owners diſpoſſeſt, they may maintain an Action of Trover and Converſion for an eighth or ſixteenth part of the ſame, as well by the Common Laws of this Kingdom, as the Law Marine, and they need not joyn with the reſt of their Owners.

Ship Naturalized.

Upon an information *tam quam*, grounded upon the Act of Navigation, for importing Goods in a Foreign Ship contrary to that Act. The queſtion was, whether or not, if a Foreign Ship naturalized by the new Act, being a Prize taken in the late War with *Holland*, be afterwards ſold to a Foreigner, who ſells her again to an *Engliſh* Man, whether or no the Oath muſt be taken again according to the new Act? *Per Curiam* it need not, becauſe that the Ship was once lawfully naturalized. *Hardres* 511. *Martin* againſt *Verdue*.

Forfeitures for delivering Goods without paying the Duties.

XV. Stat. 4th and 5th *Will.* and *Ma. cap.* 15. §. 14. All perſons who by way of Inſurance, or otherwiſe, ſhall undertake to deliver any Goods imported from beyond Sea without paying the Duties payable for the ſame, or any prohibited Goods, ſhall forfeit 500 *l.*

§. 15. And all who ſhall agree to pay any Money, for the inſuring or conveying any Goods imported without paying the Duties, or any prohibited Goods, or ſhall receive ſuch prohibited Goods, or ſuch other Goods before the Duties are paid, knowing thereof; ſhall alſo forfeit for every Offence 500 *l.*

And if the Inſurer or Manager of ſuch Fraud be diſcovered, he ſhall not only keep the Inſurance Money given him, and be diſcharged of the Penalties to which he is liable, but ſhall have one half of the Penalties impoſed upon the Parties making ſuch Inſurance or receiving the Goods as aforeſaid: And in caſe no diſcovery be made by the Inſurer, and the Party Inſured ſhall make diſcovery thereof, he ſhall recover back his *Præmium*, and have one Moiety of the Forfeitures impoſed upon the Inſurer, and be diſcharged of thoſe impoſed upon himſelf. §. 16.

The ſaid Penalties and Forfeitures to be recoverable according to the Courſe of the Exchequer. §. 17.

No Penalty to be recoverable, unleſs proſecuted within 12 Months after the Fact committed. §. 18.

Chap. II.

Maſters of Ships their action conſidered in reference to caſes private and publick.

I. *A Maſter or Skipper his condition conſidered, in reference to his Intereſt and Authority generally. The Maſter only liable to deviation and Barratry.*

II. *If Goods be loſt or imbezled, or any other detriment happens in a Port, who ſhall anſwer. Maſter chargeable to pay the Duty of weighage.*

III. *The Duty of* Maſters of Ships, *as if they ſhall ſet Sail after an Embargo, who ſhall anſwer?*

IV. *Of Faults aſcribed to him before departure in Tempeſtuous weather, ſtaying in Port,* &c.

V. *Over-charging or over-lading the Ship above the Birth-mark, or receit of ſuch Perſons on Ship-board as may hazard the Lading.*

VI. *Of Lading aboard in the Ships of Enemies, his own proving diſabled.*

VII. *Of ſhipping Goods elſewhere than at the publick Ports or Keys, and the taking in prohibited Goods.*

VIII. *Of wearing unlawful Colours or Flags, and of yielding up his Ship cowardly, if aſſaulted, where liable, and where excuſed.*

IX. *Of carrying fictitious Cocquets and Papers, and refuſing payment of Cuſtoms and Duties.*

X. *Of ſetting Sail with inſufficient Tackle, and of taking in and delivering out with the like; and of his Charge of Goods till ſafely delivered.*

XI. *Of departing without giving notice to the Cuſtomer.*

XII. *Of Faults committed by Maſter and Skippers at Sea.*

XIII. *Rules in Law in the charging him for reparation of damage. Infant Maſter of a Ship ſuable in the Admiralty, for waſting or ſpoiling Goods.*

XIV. *Of the Power and Authority that the Maſter hath in diſpoſing Hypothecating or Pledging the Ship, Furniture and Lading.*

XV. *Where Maſters are diſabled, though in neceſſity, to impawn the Veſſel.*

XVI. *Where they may diſpoſe of Veſſel and Lading, and where not.*

XVII. *What Veſſels and Mariners the Maſter muſt have for importing in or exporting out of his Majeſty's Plantations in* Aſia, Africa, *and* America.

XVIII. *What Ships may go from Port to Port in* England.

XIX. *Ships not to import the Goods of any Country, but of that from whence they are brought.*

XX. *What time the Maſter ſhall be coming up after arrived at* Graveſend, *or at any other Port within the Realm, in order to his diſcharge.*

XXI. *Of going from Port to Port within the Realm how provided.*

XXII. *Of Goods prohibited to be imported from the* Netherlands *or* Germany *in any Ships whatſoever.*

I. A Maſter of a Ship is no more than one, who for his knowledge in *Navigation*, fidelity and diſcretion, hath the Government of the Ship committed to his care and management; and by the *Common Law*, (by which Properties are to be guided,) he hath no Property either general or ſpecial, by the conſtituting of him a Maſter; yet the Law looks upon him as an *Officer*, who muſt render and give an account for the whole charge, when once committed to his care and cuſtody; and upon failure to render ſatisfaction: And therefore if misfortunes happen, if they be either through negligence, wilfulneſs, or ignorance of himſelf or his Mariners, he muſt be reſponſible.

Leg. 1. *de Exercit. Act.*

Hob. Rep. fol. 11. *Bridgman's* Caſe.

A Maſter of a Ship ſo appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns to Sail from *London* to *Falmouth*, and ſo from thence to *Barcelona*, without altering the Voyage; and there to unlade at a certain Rate *per* Tun. And to perform this the Maſter obliges the Ship and what was therein, valued at 300 *l.* and accordingly a Charter-party was made and ſealed between the Maſter and the Merchant, but the Owners of the Ship were no Parties thereunto. The Maſter deviates and commits Barratry, and the Merchant, in effect loſes his Voyage and Goods, for the Merchandize being Fiſh, came not till *Lent* was paſt, and were rotten. The Merchant's Factor thereupon ſueth the Maſter in the Court of Admiralty at *Barcelona*, and upon an Appeal to an higher Court in *Spain*, hath Sentence againſt the Maſter and the Ship; which coming to his Hands (*viz.*) the Merchants Hands, the Owner brings an Action of Trover for the Ship; the Maſter ſues in Chancery to ſtop this Suit, and another Suit brought for the Owner for Freight, claiming deductions out of both, for his Damages ſuſtained by the Maſter, for the breach of the Articles by the Maſter, for if the Owner gives Authority to the Maſter to contract he ſhall bear the loſs, but in Caſe of Bottomry after a Voyage begun the Maſter cannot oblige the Owner beyond the Value of the Ship: But this Caſe is on Contract.

In Chancery.

Lord Chancellor, The Charter-Party values the Ship at a certain rate, and you ſhall not oblige the Owners farther, and that only with relation to the Freight, not to the value of the Ship; the Maſter is liable to the deviation and Barratry, but not the Owners; elſe Maſters ſhould be Owners of all mens Ships and Eſtates, *Mich.* 29. *Cap.* 2.

II. If the fault be committed in any Port, Haven, River or Creek, or any other place which is *infra Corpus Comitatûs*, the *Common Law* ſhall have Juriſdiction to anſwer the party damnified, and not the *Admiralty*; but if the ſame be committed *ſuper altum mare*, the Admiralty ſhall have Juriſdiction of the ſame; yet if it be on a place where there is *diviſum imperium*, then according to the Flux or Reflux the Admiralty may challenge the other of Common right belonging to the *Common Law*.

Vide 5 *Co.* 107. *Mo.* 891, 916.

And therefore ſo ſoon as Merchandizes and other commodities are put aboard the Ship, whether ſhe be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargeable therewith; and if the ſame be there loſt or purloyned, or ſuſtain any damage; hurt or loſs, whether in the Haven or Port before, or upon the Seas after ſhe is in her Voyage, whether it be by Mariners or by any other through their permiſſion, he that is *Exercitor Navis* muſt anſwer the damage, for that the very lading of the Goods aboard the Ship, does ſubject the Maſter to anſwer the ſame; and with this agrees the *Common Law*, where it was adjudged, That Goods being ſent aboard a Ship, and the Maſter having ſigned his Bills of Lading for the ſame, the Goods were ſtowed, and in the night divers Perſons, under the pretence that they were Preſs-maſters, entered the Ship and robb'd her of thoſe Goods; the Merchant brought an Action at the *Common Law* againſt the Maſter; and the Queſtion was, Whether he ſhould anſwer for the ſame; For it was alledged on his part, That there was no default or negligence in him, for he had a ſufficient guard, the Goods were all lock'd up under Hatches, the Thieves came as *Preſs-Maſters*, and by force robb'd the Ship; and that the ſame was *vis major* †, and that he cou'd not have prevented the ſame. And laſtly, That though he was called Maſter or *Exercitor Navis*, yet he had no ſhare in the Ship, and was but in the Nature of a Servant, acting

F. Naut. caup. ſtab. leg. 1. *Sect.* 2, 3, 6, 7.

1 *Mod.* 85. *Raym.* 220. 1 *Ven.* 190, 238. 2 *Keb.* 866. 3 *Keb.* 72, 112, 132, 135.

† The which the Civil Law does ſometimes allow.

acting for a Salary. But notwithſtanding it was adjudged * for the Plaintiff, for at his peril he muſt ſee that all things be forth-coming that are delivered to him, let what accident ſoever happen; (the act of God, or an Enemy, perils and dangers of the Seas only excepted) but for Fire, Thieves and the like, he muſt anſwer, and is in the nature of a * Common Carrier; and that though he receives a Salary, yet he is a known and publick Officer, and one that the Law looks upon to anſwer, and the Plaintiff hath his Election to charge either Maſter or Owners, or both at his pleaſure, but can have but one Satiſfaction.

* *Rey.* 105. *F. N. B.* 104 *b.* 1 *Inſt.* 89. 4 *Co.* 84. *a.* *Mo.* 876. *Hob.* 17, 18. *Poph.* 178, 179 *Cro. Jac.* 188, 189, 330, 331. *Salk.* 388. 1 *Sid.* 36.

Debet Exercitor omnium nautarum, ſuorum ſive liberi ſint ſive ſervi, factum præſtare, nec immerito factum eorum præſtat, cum ipſe eos ſuo periculo adhibuerit: Sed non alias præſtat quam ſi in ipſa navi damnum datum ſit, cæterum, ſi extra navim licet à nautis, non præſtabit. Naut. Caup. Stabilit. Leg. 1. *Sect.* 7. *debet Exercitor.*

If a Maſter ſhall receive Goods at the Wharf or Key, or ſhall ſend his Boat for the ſame, and they happen to be loſt, he ſhall likewiſe anſwer both by the Marine Law and the *Common Law.*

Ead. Leg. debet Exercitor,

Mayor & Com. de London againſt *Hunt.*

Error of a Judgment in B. R. in Aſſumpſit brought by the Mayor and Commonalty againſt *Hunt*, where they declared of a Cuſtom, That they and their Predeceſſors, Mayors, *&c.* had of every Maſter of a Ship 8 *l. per* Tun for every Tun of Cheeſe brought from any place in *England* to the Port of *London, ab oriente de London-Bridge*, in the name of Weighage; and that the Defendant being Maſter of a Ship, had brought to the Port of *London* ſo many Tuns, which at that rate came to ſo much, which he hath not paid, upon *non Aſſumpſit*, Verdict and Judgment for the Plaintiff. Upon which *Hunt* the Defendant, brought a Writ of Error, and two Errors were aſſigned. 1. That the Action did not lye againſt the Maſter, but that the Duty was due from the Merchants, Owners of the Goods, but the Judgment was affirmed, for that the Maſter is intruſted with the Goods, and hath a Recompence from the Merchants for bringing the Goods, and is reſponſible for them, and therefore ſhall be charged for the Duty; and it would be infinite to ſearch for the Owners of the ſeveral Goods, which are all in the Cuſtody of the Maſter

Maſter who brought them into Port, and therefore he ſhall be charged. 3. *Levinz.* 37.

Digeſt. lib. 9. *tit.* 2. *Leg.* 61.

III. If Goods be laden aboard, and after an Embargo or Reſtraint from the Prince or State comes forth, and then he breaks Ground, or endeavours to ſail away, if any damage accrues, he muſt be reſponſible for the ſame. The reaſon is, becauſe his Freight is due and muſt be paid; nay, although the very Goods be ſeized as *bona contrabandos*.

* *Leg Oleron. Judg.* 2.

IV. He muſt not ſail in Tempeſtuous weather, nor put forth to Sea without having firſt conſulted with his Company*; nor muſt he ſtay in Port or Harbour without juſt cauſe when a fair wind invites his departue.

V. He muſt not over-charge or lade his Ship above the Birth-mark, or take into his Ship any Perſon of an obſcure and unknown Condition, without Letters of ſafe Conduct.

Stat. 18 *H.* 6. *cap.* 8. *Lib ult. ad Leg. Rhod. & Leg. quum proponas C. de Naut. fænor.*

VI. Nor ought he to lade any of his Merchant's Goods aboard any of the King's Enemies Ships (admitting his own Veſſel leaky or diſabled) without Letters of ſafe Conduct; otherwiſe the ſame may be made Prize, and he muſt anſwer the Damage that follows the Action.

Stat. 4 *H.* 4. 20.

Nor ſhall he come or ſneak into the Creeks or other places, when laden homewards, but into the King's great Ports, (unleſs he be driven in by Tempeſt) for otherwiſe he forfeits to the King all the Merchandize, and therefore muſt anſwer.

Stat. 15 *H.* 6. *cap.* 8. 1 *El. c.* 11. §. 2. 13, 14 *G.* 2. *c.* 11. §. 14.

VII. Nor ought he to ſhip any Merchandizes, but only at the *Publick* Ports and Keys.

39 *Eliz. cap* 9. 1, 2 *P. & M* 5. 1 *Jac. cap.* 25. 12 *Car.* 2. *cap.* 18.

He muſt not lade any prohibited or unlawful Goods, whereby the whole *Cargo* may be in danger of Confiſcation, or at leaſt ſubject to ſeizure or ſurreption.

* Proclamation *Sept.* 25. *Anno* 26 *Car.* 2.

He may not ſet ſail without able and ſufficient Mariners both for quality and number.

Per Leg. quum proponas ad Leg. Rhod.

VIII. He may not uſe any unlawful Colours, Enſigns, Pendants, Jacks or *Flags* *, whereby his Ship or Lading may incur a Seizure, or the Cargo receive any detriment or damage.

D Leg in fin. & Leg. ſi vendita peric. rei vend. & Leg. 5 *&* 6. *Naut. Caup.*

He muſt not ſuffer the Lading to be ſtoln or imbezled; if the ſame be, he muſt be reſponſible, unleſs it be where there is *vis major*; as if he be aſſaulted at Sea either by Enemies,

mies, Ships of Reprize, or Pirates; there, if no Fault or negligence was in him, but that he performed the part of an honeſt, faithful, and valiant man, he ſhall be excuſed. Yet it hath been adjudged, That if a Merchant-man lies in a Port or Haven, and a Pirate, Sea-Rover, or other Thieves enter her and over-power her Men, and then rob her, yet the Maſter muſt be reſponſible; but if an Enemy enter and commit the depredation, there the Maſter is excuſed. 2 *Keeble* 866, 3 *Keb.* 72, 112, 132, 135. 1. *Ven.* 190, 238. *Raymond* 220. 1. *Mod.* 85. 2. *Levinz.* 69.

IX. He muſt not carry any counterfeit Cocquets or other fictitious and colourable Ship-Papers to involve the Goods of the Innocent with the Nocent. 13 *R.* 2. *cap.* 9. *Leg.* 1. *Cod. de Navib. non excuſand.*

Nor muſt he refuſe the payment of the juſt and ordinary Duties and Port-charges, Cuſtoms and Imports, to the hazard of any part of his Lading; yet if he offers that which is juſt and pertains to pay, then he is excuſed. *Secund. fin. Leg. ult. ad Leg. quum proponas C. de Naut fænor Leg. Oleron.* 24. *Per. Leg. quant. de pub.*

X. He muſt not ſet ſail with inſufficient Rigging or Tackle, or with other or fewer Cables than is uſual and requiſite, reſpect being had to the burden of the Veſſel: And if any damage happens by the delivery of the Goods into the Lighter, as that the Ropes break, and the like; there he muſt anſwer; but if the Lighter comes to the Wharf or Key; and then in taking up the Goods, the Rope breaks, the Maſter is excuſed, and the Wharfinger is liable.

If fine Goods, or the like, are put into a cloſe Lighter, and to be conveyed from the Ship to the Key, it is uſual there, that the Maſter ſend a competent number of his Mariners to look to the Merchandize, if then any of the Goods are loſt and imbezelled, the Maſter is reſponſible*, and not the Wharfinger; but if ſuch Goods are to be ſent aboard a Ship, there the Wharfinger, at his Peril, muſt take care the ſame be preſerved. * *Paſch.* 26 *Car.* rul'd at *Guild Hall* by L. C. J. *Hales.*

XI. After his arrival at Port, he ought to ſee that the Ship be well moared and anchored, and after reladed, not to depart or ſet ſail till he hath been cleared; for if any damage happens by reaſon of any fault or negligence in him or his Mariners, whereby the Merchant or the Lading receives any damage, he muſt anſwer the ſame. 18 *Eliz. cap* 9. 14 *Car.* 2. *cap.* 11.

XII. And as the Law aſcribes theſe things and many more to him as faults, when committed by him or his

Mari-

Mariners in Ports, ſo there are other things which the Law looks upon to be as faults in him in his Voyage, when done.

Digeſt. l. cum in debito F. de Probat.

As if he deviates in his courſe without juſt cauſe, or ſteers a dangerous and unuſual way, when he may have a more ſecure paſſage; though to avoid illegal impoſitions, he may ſomewhat change his courſe; nor may he ſail by places infeſted with Pirates, Enemies, or other places notoriouſly known to be unſafe, nor engage his Veſſel among Rocks or remarkable Sands, being thereto not neceſſitated by violence of Wind and Weather, or deluded by falſe Lights.

Lib. 1. Cod. de Navibus non excuſand.

The Maſter ſhall not be anſwerable for the Contracts of their Mariners, but they may be detained for their Crimes.

XIII. By the Marine Law, he that will charge a Maſter with a Fault, as in relation to his Duty, muſt not think that a general charge is ſufficient in Law, but he ought to aſſign and ſpecifie the very fault wherewith he is ſo charged.

So that he will not infer, that ſuch or ſuch a ſad diſaſter hath happened or been occaſioned by reaſon of ſome fault in the Mariners; muſt not only prove the fault it ſelf, but muſt alſo prove that that fault did diſpoſe to ſuch a ſad event; or that ſuch a misfortune could not have happened without ſuch a fault precedent.

Infant Maſter of a Ship, liable to be ſued in the Admiralty.

If an Infant being Maſter of a Ship, by Contract with another, take upon him to bring certain Goods from S. *Chriſtophers* to *England*, and there to deliver them, but delivers them not according to agreement, but waſtes and conſumes them, he may be ſued in the Admiral Court, altho' he be an Infant, for this Suit is but in Nature of a Detinue or a Trover and Converſion at the Common Law, and a Prohibition denied for that Cauſe. *Furnes* againſt *Smith*. 1 *Rolls Abr*. 530.

XIV. When Voyages are undertaken, the Maſter is there placed in by the Owners, and they ought to make good the Maſters fact and deed; † and therefore as the whole care and charge of Ship and Goods are committed to the Maſter, it is the prudence of the Owners to be careful who they will admit Commander of their Ship, ſince their actions ſubject them to anſwer the damage, or what-

†*Receipt. ſalvumfore, utrum ſi in navim reſ. miſſæ ei aſſignatæ ſint, an et ſi non ſint ei*

whatever other Act he ſhall do in reference to his Imploy; and therefore he can freight out the Veſſel, take in Goods and Paſſengers, mend and furniſh the Ship, and to that effect, if need be, in a ſtrange Country he may borrow Money, with advice of his Mariners, upon ſome of the Tackle, or ſell ſome of the Merchandize. If part of the Goods ſhall be ſold in ſuch neceſſity, the higheſt price that the remainder are ſold for, muſt be anſwered and paid to the Merchant; after which the Merchant may pay for the Freight of thoſe Goods as well as for the remainder, *Leg. Oleron.* 1. But if the Ship in the Voyage happens to be caſt away, then only ſhall be tendred the price that the Goods were bought for.

aſſignatæ, hoc tamen ipſo quod in navim miſſæ ſint, receptæ videntur, & omnium receptis cuſtodiam quæ in navim illatæ ſunt, & factum non ſolum nautarum preſtare debet, ſed & rectorum. F. Nautæ Caup. Stab. Leg. 1. Sect. receipt,

By the *Common Law*, the Maſter of a Ship could not impawn the Ship or Goods, for any Property either general or ſpecial was not in him, nor is ſuch power given unto him by the conſtituting of him a Maſter.

Yet the *Common Law* hath held the Law of *Oleron* reaſonable, That if a Ship be at Sea and takes leak, or otherwiſe want Victuals or other Neceſſaries, whereby either her ſelf be in danger, or the Voyage may be defeated, that in ſuch caſe of neceſſity the Maſter may impawn for money or other things, to relieve ſuch extremities, by imploying the ſame to that end; and therefore he being the Perſon truſted with the Ship and Voyage, may therefore reaſonably be thought to have that power given to him implicitly, rather than to ſee the whole loſt.

Leg. Oleron. c. 22. *Hob.* 11, 12. *Latch* 252. *Noy.* 95. *Mo.* 918. *Leg Oleron c.* 1, 12. *Salk.* 34. *pl.* 7. *Lex Mercator* 102. 122.

A Ship put into *Boſton* in *New-England*, and there the Maſter took up Neceſſaries, and gave a Bill of Sale by way of Hypothecation, and there being a Suit againſt the Ship and Owners to compel Repayment, a Prohibition was prayed; whereupon the Court held, that the Maſter could not by his Contract make the Owners perſonally liable to a Suit, and therefore granted a Prohibition as to them, but refuſed it as to the Ship; for the Maſter can have no Credit but upon giving ſecurity by Hypothecation: and that it was unreaſonable for them to prevent the Court of Admiralty's giving a Remedy, when they could give none themſelves.

Salk. 35 *pl* 9. 2 *Mod. Cap.* 79.

But a Maſter for any debt of his own, cannot Impawn or Hypothecate the Ship, *&c.* for the ſame is no ways liable but in caſe of neceſſity for the relief and compleating of the Voyage.

Nor

1 Siderf. 453. Vid. 1 Rolls. Abr. 530. pl. 2. Nor can he ſell or diſpoſe of the ſame without an Authority or Licence from the Owners; and when he does Impawn or Hypothecate the Veſſel or Furniture, he ought to have the conſent and advice of his Mariners.

XV. And where the Ship is well engaged, ſhe is for ever obliged, and the Owners are concluded thereby till Redemption.

But in regard Maſters might not be tempted to engage the Owners, or infetter them with ſuch ſort of obligations, but where there is very apparent cauſe and neceſſity, they ſeldom ſuffer any to go Skipper or Maſter, but he that hath a ſhare or part in her; ſo that if Monies or Proviſions be taken up he muſt bear his equal ſhare and proportion with the reſt.

Judgment, Oleron. cap. 22. Nor can the Maſter on every caſe of neceſſity impawn the Veſſel or Furniture; for if ſhe be Freighted, and he and the Owners are to join in the laying in of the Proviſions for the Voyage, and perhaps he wants money, (a great ſign of neceſſity) yet can he not impawn the Veſſel or Furniture, any other or further than for his own part or ſhare in her, the which he may transfer and grant as a man may do an eighth or fifth part in Lands or Houſes: But ſuch obligation of the Veſſel muſt be in Foreign parts or places where the calamity or neceſſity is univerſal on the Veſſel, that will oblige all the Owners.

XVI. If the Veſſel happens afterwards to be wreckt or caſt away, and the Mariners by their great pains and care recover ſome of the ruins and lading, the Maſter in that caſe may pledge the ſame, the product of which he may diſtribute amongſt his diſtreſſed Mariners, in order to the carrying them home to their own Country: But if the *Judgment, Oleron. cap. 3.* Mariners no way contributed to the Salvage, then their reward is ſunk and loſt with the Veſſel. And if there be any conſiderable part of the Lading preſerved, he ought not to diſmiſs the Mariners, till advice from the Laders or Freighters; for otherwiſe perchance he may be made liable.

If Merchants Freight a Veſſel at their own charges, and ſet her to Sea, and ſhe happens afterwards to be Weather-bound, the Maſter may impawn either the Ship or *Leg. Oleron. cap. 22.* Lading at his pleaſure, or at leaſt ſuch as he could conveniently raiſe monies on, rather than ſee the whole Voy-

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age loſt. And if he cannot pawn the Lading, he may ſell the ſame, that is, ſo much as is neceſſary; in all which caſes his act obliges.

However, Orders and Inſtructions are as carefully to be look'd upon and followed as the Magnet.

XVII. He is not to Import into, or Export out of any the *Engliſh* Plantations in *Aſia*, *Africa*, or *America*, but in *Engliſh* or *Iriſh* Veſſels, or of the Veſſels built and belonging to that Country, Iſland, Plantation, or Territory; the Maſter and 3 fourths of the Mariners to be *Engliſh*, upon forfeiture of Ship and Goods; and if otherwiſe, they are to be look'd upon as Prize, and may be ſeiz'd by any of the Kings Officers and Commanders, and to be divided as Prizes, according to the Orders and Rules of the Sea.

The like proviſion on the likepenalty is for Goods of *Muſcovy* and of the Dominions and Territories of the Great *Czar* or Emperor: So likewiſe of Currants belonging to the *Ottoman* Territories or Dominions.

All Goods of the Growth of his Majeſties Plantations are not to be imported into *England*, *Ireland*, or *Wales*, Iſland of *Jerſey* or *Guernſey*, but in ſuch Veſſels as truly belong to Owners that are of *England*, *Ireland*, *Wales*, *Jerſey* or *Guernſey*, and 3 fourths at leaſt of the Mariners are to be *Engliſh*, upon forfeiture of Ship and Goods.

Note, In caſes of ſickneſs, death, captivity, ſalves the Clauſe as to Mariners.

The Goods and Wares of thoſe Plantations, and brought in ſuch manner as aforeſaid, muſt be brought from thoſe very Countries of their ſeveral productions and growths, or from the Ports where they are uſually ſhipped out, on forfeiture of Ships and Goods.

XVIII. No Ship to go from Port to Port in *England*, *Ireland*, *Wales*, *Jerſey*, or *Guernſey*, or *Berwick*, unleſs the Owners are Denizens or Naturalized, and the Maſter and 3 fourths to be *Engliſh*.

That is thoſe that do not belong to *Engliſh*, *Iriſh*, *Welſh*, or thoſe of *Jerſey* or *Guernſey*.

All Owners muſt ſwear that their Veſſels or Ships are their own proper Ships and Veſſels, and that no Foreigner hath any ſhare or part in her, and muſt enter the ſame; and that ſhe was bought for a valuable conſideration, *Bona fide*.

XIX. Nor to bring in any Goods from any place, but what are of the growth of that very Country, or thoſe places which uſually are for the firſt ſhipping, on pain of forfeiture of their Veſſel and Furniture.

This doth not extend ſo far, but that Maſters may take in Goods in any part of the *Levant* or *Streights*, although they are not of the very growth of the place, ſo that they be imported in *Engliſh* Ships, 3 fourths *Engliſh* Mariners: So likewiſe thoſe Ships that are for *India* in any of thoſe Seas

12 *Car.* 2. *cap.* 18.

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to the Southward and Eaſtward of *Capo bona Speranza*, although the Ports are not the places of their very growth.

Any People of *England* may import (the Maſter and Mariners 3 fourths *Engliſh*) any Goods or Wares from *Spain*, *Portugal*, *Azores*, *Madera*, or *Canary* Iſlands; nay in Ships that are not *Engliſh* built: Bullion may be imported; ſo likewiſe in thoſe that are taken by way of Prize, *Bona fide*.

But Sugars, Tabacco, Cottons, Ginger, Indicoes, Fuſtick, or any other dying Wood of the growth of his Majeſties Plantations, to be ſhipped, carried or conveyed from any of the *Engliſh* Plantations, are to be carried to no place in the World, but are to come directly for *England*, *Ireland*, *Wales*, or *Berwick*, upon pain of forfeiture of Ship and Goods; and the Maſter is to give Bond with one Security in 1000 *l.* if the Ship be under the burden of 100 Tuns, and 2000 *l.* if above; that upon Lading he brings his Ship directly into *England*, *Ireland*, *Wales*, or *Berwick*, (the danger of the Seas excepted) ſo likewiſe they are to do the ſame for the Ships that ſhall go from the Plantations at the Plaintations to the Governour, upon forfeiture of the Ship and Goods.

Car. 2. *c.* 18. XX. When the Maſter ſhall arrive at *Graveſend*, he ſhall not be above three days coming from thence to the place of diſcharge; nor is he to touch at any Key or Wharf till he comes to *Cheſter's* Key, unleſs hindred by contrary Winds, or draught of Water, or other juſt impediment to be allowed by the Officers: And likewiſe he or his Purſer are there to make Oath of the Burden, Contents and Lading of his Ship, and of the Marks, Number, Contents, and Qualities of every parcel of Goods therein laden to the beſt of his knowledge; alſo where and in what Port ſhe took in her Lading, and what Country built, and how manned, who was Maſter during the Voyage, and who the Owners; and in Out-Ports muſt come up to the place of unlading, as the condition of the Port requires, and make Entries, on pain of 100 *l.*

Nor is ſuch a Maſter to lade aboard any Goods outwards to any place whatſoever, without entring the Ship
14 *Car.* 2. *c.* 11. at the Cuſtom-Houſe, of her Captain, Maſter, Burden
12 *Car.* *c.* 18. Guns, Ammunition, and to what place ſhe intends, and before departure to bring in a Note under his hand of every Merchant that ſhall have laid aboard any Goods, together

together with the marks and numbers of ſuch Goods, and be ſworn as to the ſame, on pain of 100 *l.*

No Captain, Maſter, Purſer of any of his Majeſty's Ships of War ſhall unlade any Goods before Entry made, on pain of 100 *l.*

Note, There is a Liſt of all Foreign built Ships in the Exchequer, and that no Foreign Ship not built in any of his Majeſty's Dominions of *Aſia*, *Africa*, or *America* after *Octob.* 1. 1662. and expreſly named in the Liſt, ſhall enjoy the Priviledges of a Ship belonging to *England* or *Ireland*, although owned and manned by *Engliſh*, except only ſuch as are taken by way of reprize, and condemnation made in the Admiralty as lawful Prize. None but *Engliſh* and *Iriſh* Subjects in the Plantations are to be accounted *Engliſh*.

XXI. If the Maſter ſhall have Freight from Port to Port within the Realm, he ought to have Warrant for the ſame, on pain of forfeiture of the Goods, and he is to take forth a Cocquet, and become bound to go to ſuch Port deſigned for, and to return a Certificate from the chief Officers of that Port where the ſame is deſigned for, and diſcharged within ſix Months from the date of the Cocquet.

XXII. But from the *Netherlands*, or *Germany*, there may not be imported any ſort of Wines (other than Rheniſh) Spicery, Grocery, Tobacco, Pot-aſhes, Pitch, Tar, Salt, Roſin, Deal-boards, hard Timber, Oil, or Olives in any manner of Ships whatſoever.

It might not ſeem impertinent, that this latter part which is abridged, in reference to matters publick, ſhould be inſerted; for that ſometimes it may happen that an honeſt and well meaning Maſter or Skipper might innocently involve and hazard the loſs of his Ship by committing acts againſt Laws poſitive and prohibitory; and though Maſters and Mariners, *qua tales*, be not ſo exquiſite as to know all that does belong to their Duties, or at leaſt that which the Law lays incumbent on their Shoulders; yet for that moſt of them have ſome ſmall glimmerings of the ſame, ſuch hints in matters publick as well as private, may not only be of ſome advantage to them, but alſo to Merchants, who always upon the Miſcarriages of the Maſters, prove the greateſt Sufferers; the offenders, for the moſt part, proving not ſufficiently ſolvent.

CHAP.

Chap. III.

Of Mariners, their ſeveral Offices and Immunities, and of Barratry committed by them.

I. *The ſeveral Marine Officers on Ship-board, and their Charges and Duties.*
II. *Of the Maſters power and authority over them, as in relation to puniſhing or otherwiſe.*
III. *The Duty that* Mariners *owe to each other, and they to the Ship.*
IV. *Their attendance requiſite when laded; and if detriment, where to be reſponſible.*
V. *When Accidents befal them, where they ought to be look'd after, and at whoſe coſts.*
VI. *The Mariners Oath where requiſite to the diſcharging of the Maſter.*
VII. *What Accidents do deſtroy, and what not, their wages.*
VIII. *Where they may joyn all in a Suit for the recovery of their Wages, and where not.*
IX. *Of their Wages where liable to anſwer damage.*
X. *Where they abſolutely loſe their Wages.*
XI. *Of Money or Goods taken up by a* Mariner, *where it ſhall be debt, and where a Diſcount of his Wages.*
XII. *And of their becoming liable to correction.*
XIII. Barratry *in the* Mariners, *the reaſon why the Law imputes offences in them to be anſwered by the Maſter.*
XIV. *In what caſes the Maſter ſhall become liable for the Actions of his* Mariners.
XV. *Of Goods purloyned before they are brought on Ship-board, where the Maſter is bound to anſwer, and where not.*
XVI. *Of the Antiquity of ſuch Cuſtom.*
XVII. *Of Goods brought ſecretly in on Ship-board, if purloyned, where the Maſter is not made liable.*
XVIII. *Of Caution or fore-warning, where the ſame ſhall excuſe the Maſter.*
XIX. *Where the Maſter ſhall be liable, notwithſtanding ſuch Caution.*

I. THE perſons ordinary for ſailing in Ships have divers denominations: The firſt, which is the Maſter, known to us and by moſt Nations both now and of old, and eſpecially by the *Roman* Laws, *Navicularius* or *Magiſter Navis*; in *Engliſh* render'd Maſter; or *Exercitor Navis*; in the *Teutonick* Skipper; by the *Grecians*, *Navarchus* or *Nauclerus*; by the *Italians Patrono*. But this is only to thoſe

Leg. 1. & paſſim ad Leg. Rhod. & lib. 1. parag. 2. Naut. Caup.

thoſe Veſſels that are Ships of Burden and of Carriage; For to Ships of War the principal there is commonly called Commander or Captain. The next in order of Office to the Maſter, is he who directs the Ship in the Courſe of her Voyage, by the *French* called *Pilote*; by the *Engliſh* and *Flemming*, *Steerſman*; by the *Romans*, *Gubernator*; by the *Italians*, *Nochiero Pilotto* and *Navarchus*, as *Gerettus* writes. The third is eſteemed the Maſters Mate or Companion, chiefly if the Maſter be Steerſman himſelf; of old by the *Græcians* and *Romans* called *Proreta*; his charge is to command all before the Maſt. *Vid. Leg. Conſol.*

His Succeſſor in order is the Carpenter or Shipwright, by thoſe two Nations of old, called *Naupegus* by the latter; by the firſt *Calaphates*; from the Loins of one of that Rank ſprang that great Emperour *Michael*, ſurnamed *Calaphates*, who denyed not to own the quality of his Father among his Regal Titles. The very Name of *Calaphate* the *Venetian* and *Italian* ſtill uſe to this Day. The Father was of *Phalagonia*, as *Egnatius Volaterranus* obſerves *lib.* 23.

The next who ſucceeds in order, is he who bears the Charge of the Ships Boat, by the *Italians* called *Braobierie*; by the *Græcians* and *Romans*, *Carabita*, from *Carabus*, which denotes the Boat of a Ship.

The ſixth in order, eſpecially in Ships of Burden, is the Clerk or *Purſer*, by the *Italians* called *Scrivano*, whoſe Duty is the regiſtring and keeping the Accounts of all received in or delivered out of the Ship; for all other Goods that are not by him Entred or taken into Charge, if they happen to be caſt over-board in a Storm, or are ſtoln or imbezled, the Maſter anſwers them not, there being no Obligation on him by Law for the ſame; his Duty is to unlade by Day, not Night. *Il Conſolato* *Stat.* 14 *Car.* 2. *cap.* 11.

The ſeventh a moſt neceſſary Officer as long as there are aboard Bellies, ſharp Stomachs and Proviſion, called the *Cook*.

The eighth is the Ship's Boy, who keeps her continually in Harbours, called of old by the *Græcians*, *Nauphilakes*; by the *Italians*, *Guardino*: Theſe Perſons are diſtinct in Offices and Names, and are likewiſe diſtinguiſhed in their Hires and Wages; the reſt of the Crew are under the common Name of Mariners, by the *Romans* called *Nautæ*; but the *Tarpollians*, or thoſe Youths or Boys that are Ap- *Budæus ad Leg* 1. *Naut. Caup. &c.*

prentices, obliged to the moſt ſevile Duties in the Ship, were of old called *Meſonautæ*.

II. The Maſter hath the ſupreme Rule on ſhip-board, and by that Means his Power and Authority is by Law much countenanced, eſpecially in the keeping his Crew in Peace ſo long as they eat his Bread; and if a *Mariner* ſhall happen to be bruiſed or hurt in doing his Duty and Service, the Maſter * is to take Care that he be carefully look'd after, in order to the procuring his Recovery; and if it be occaſioned by the Miſcarriage of another on Ship-board, he may refund the Damage out of his Wages, but ſtill remembring who gave the firſt Aſſault.

* *Per. Leg. Oleron, cap.* 6.

Pe Leg. de exerc. act. & l. in fin. Naut. Caup.

If it happens that the Maſter commands his Boat to be manned out, and it ſo happens that the ſame is out of order, or unfit to take the Sea, the Tews, or other Accoutrements being Impotent, if the *Mariners* happen to be drowned, the Maſter is to repay by the Law *Marine* one whole Year's Hire to the Heirs of the drowned: Therefore Maſters ought carefully to view and ſee that the Boat be fit for Men to truſt their Lives in upon his Command.

If a *Mariner* ſhall commit a Fault, and the Maſter ſhall lift up the Towel three times before any *Mariner*, and he ſhall not ſubmit, the Maſter at the next Place of Land may diſcharge him; and if he refuſeth to go aſhore, he ſhall loſe half his Wages, and all his Goods within the Ship. If the *Mariner* ſhall ſubmit, and the Maſter will not receive the ſame, he ſhall have his whole Wages; or if the *Mariner* ſhall depart the Ship on the Maſter's Command, and the Maſter happens not to take another, if any Damage happens to Ship or Goods, the Maſter muſt anſwer.

Pir Leg: Oleron, cap. 14.

III. *Mariners* muſt help one another at the Sea and in Port; if any refuſe, upon the Oaths of his Fellows, he loſeth his Wages. None of the Crew muſt or ought to leave the Ship, without Leave of the Maſter, when ſhe comes to a Port, or rides at Anchor, but always conſtantly to wait upon her till they are diſcharged, or have leave, at leaſt half to be left on Ship-board.

Per Leg. Oleron, cap. 13. *& per Leg. Denmarc,*

A *Mariner* may not carry out of the Ship above one Meal's Meat, but Drink not a drop; and when on Ship-board, ought not to be there arreſted for Debt, but only

Leg. nemo de Reg. jur. & Leg plerumq; de in jus voc.

ly ſo much of his Wages in the Hands of the Maſter attached: Yet this is doubted, if it be not on a ſworn Debt, that is, a Judgment or Sentence, or a Penalty to the King.

They ought not to depart from on Ship-board when once admitted into their full Pay (which is always when they break Ground) without Licence of the Maſter; and before the may ſo do, they are to leave a ſufficient number to guard the Ship and Decks.

See the ſeveral Acts of the 7th and 8th *William* III. *Cap.* 21. Intituled an Act for the Encreaſe and Encouragement of Seamen; and of the 8th and 9th of the ſame King, *Cap.* 23. Intituled an Act for the further Encreaſe and Encouragement of Sea-men, for regiſtring of Seamen, and providing for their Widows and Children in ſuch manner as therein is mentioned, too lage to be recited here.

IV. If the Ship breaks Ground, and is ſet ſail, if after ſhe arrives at her deſired Port, their full Pay continues till ſhe returns; nor may they in any wiſe depart from on Ship-board without Leave or Licence of the Maſter; if they do, and any Diſaſter happens, they muſt anſwer: Yet at ſuch Port if the Veſſel be well moared and anchored with two Cables, they may go without leave, yet ſo as they leave a ſufficient number behind to guard the Decks: But then their return muſt be in due Seaſon; for if they make longer ſtay, they muſt make Satisfaction. *Leg. Oleron, cap.* 5.

V. If *Mariners* get drunk and wound one another, they are not to be cured at the Charge of the Maſter or Ship; for ſuch Accidents are not done in the Service of the Ship: But if any of the *Mariners* be any ways wounded, or do become ill in the Service of the Ship, he is to be provided for at the Charges of the Ship; and if he be ſo ill as not fit to travel, he is to be left aſhore, and Care to be taken that he hath all Accommodations of Humanity adminiſtred to him: And if the Ship is ready for a Departure, ſhe is not to ſtay for him; if he recover, he is to have his full Wages deducting the Maſter's Charges which he laid out for him. *Leg. Oleron, cap.* 7.

VI. In Caſe of Storm if Goods are caſt over-board for lightning the Ship, the Oaths of the *Mariners*, ſwearing *Leg. Oleron, cap.* 11.

that it was done for the Preſervation of the Veſſel and the reſt of the Lading, ſhall diſcharge the Maſter.

So Goods damnified at Sea, are cleared by the Oath of the Maſter and *Mariners*, by the Laws of *Oleron*.

Leg. Oleron. cap. 13. To aſſault the Maſter on Ship-board, is a Crime that ſubjects the *Mariner*'s Hand to be cut off, unleſs he redeems it at 5 *Solz*.

VII. If a Ship happens to be ſeized on for Debt, or otherwiſe to become forfeited, the *Mariners* muſt receive their Wages, unleſs in ſome Caſes where their Wages are forfeited as well as the Ship; as if they have Letters of Mart, inſtead of that they committed Piracy, by reaſon of which there becomes a forfeiture of all; but Lading of prohibited Goods aboard a Ship, as Wool, and the like, though it ſubjects the Veſſel to a Forfeiture, yet it diſables not the *Mariner* of his Wages; for the *Mariners* having honeſtly perform'd their Parts, the Ship is tacitly obliged for their Wages: But if the Ship periſhes at Sea, they loſe their Wages, and the Owners their Freight. And this being the Marine Cuſtom, is allowed by the *Common Law* as well as the *Civil Law*.

Conſolat. del. mere. *Trin.* 7 *Jac. B. R.* Abridg. Roſs, *fol.* 530.

VIII. The Courts at *Weſtminſter* have been very favourable to *Mariners* in order to the ſuing for Wages, for at the *Common Law* they cannot joyn, but muſt ſue all diſtinct and apart for their Wages.

Yet in the Admiralty they may all joyn, and the Courts at *Weſtminſter* will not grant a Prohibition: And ſo it was rul'd where one *Jones* † a Maſter of a Ship was ſentenced in the Admiralty for Wages at the Suit of Poor *Mariners*, a Prohibition being prayed upon a Suggeſtion that the Contract was made at Land, and not *ſuper altum mare*; the Court denied it, for that he came too late, Sentence being given below againſt him: Yet if the *Mariners* had only libelled, and there had been no Sentence, and the Defendant had prayed a Prohibition, as above, yet the Court would have denied it. This hath been, and is uſually done.

1 *Vent.* 146. 343. 2 *Vent.* 181. 2 *Keeble* 779. † *Jones verſus* the poor Mariners. *Winch.* Rep. 8.

Salk. 33. *pl.* 4. It was by meer Indulgence that Mariners were permitted to ſue in the Admiralty for their Wages: And this Indulgence was, becauſe the Remedy in the Admiralty was the eaſier and better; eaſier, becauſe they muſt ſever here, whereas they may joyn there; and better,

better, becauſe the Ship it ſelf is anſwerable: but it is expreſſly againſt the Statute, tho' now *Communis Error facit Jus.* The firſt inſtance of it is in *Winch* 8. Yet it was never allowed the Maſter ſhould ſue there; nor is it reaſonable where he commenceth the Voyage as Maſter; for tho' the Mariners contract upon the Credit of the Ship, the Maſter doth contract on the Credit of the Owners.

But yet the Mate may ſue in the Admiralty for his Wages, becauſe he Contracts with the Maſter, as the reſt of the Mariners do. *Salk* 33. *pl.* 5.

But the Court will be very well informed, that the Libel is for *Mariners* Wages; for ſome who work Carpenter's work and ſuch like Labour aboard a Ship in a Haven or Port within the Realm (which is *infra Corpus Comitatûs*, (notwithſtanding thoſe great and ingenious Objections againſt it) and muſt be tried by the *Common Law*, and not elſewhere) will libel under that Cloak for *Mariner's* Wages. But the Court in that caſe will grant a Prohibition. And ſo it was done in the like Caſe. *Sitwell & al.* Owners of a Ship *verſ. Leve & al. Mich.* 27 *Car.* in B.R

But if a Ship rides at Anchor in the Sea, and the Maſter ſends his Boat aſhore for Victuals or other Proviſions for the Ship, and accordingly the *Providore* or Slop-ſeller does bring Victuals and Proviſions aboard; in that Caſe if the Contract be made there, it muſt be ſued for in the Admiralty: But if the Goods are by the Purſer or *Mariners* contracted for at Land, they muſt ſue at *Common Law*. *Latch. fol.* 11. *Hill.* 1 *Car.* in B. R. *Godfrey's* Caſe.

IX. If Goods are ſo Imbezled, or ſo Damnified that the Ship's Crew muſt anſwer, the Owners and Maſter muſt deduct the ſame out of their Freight to the Merchants, and the Maſter out of the Wages of the *Mariners*; for though Freight is the Mother of Wages, ſo is it the very Father of Damage; For before the *Mariner* can claim his Wages out of what the Ship hath earn'd, the Ship muſt be acquitted from the Damage that the Merchant hath ſuſtained by the Negligence or Fault of the *Mariners*: And the reaſon is, for that as the Goods are obliged to anſwer the Freight, ſo the Freight and Ship is tacitly obliged to clear the Damage; which being done, the *Mariners* are then let in to their Wages.

Leg. Oleron. X. If a Mariner be hired, and he deſerts the Service before the Voyage ended, by the *Law Marine* he loſes his Wages: And the ſame Cuſtom at *Common Law* pleaded, it hath been conceived will bar him.

If a *Mariner* ſhall commit any wilful or negligent Fault, by reaſon of which the Maſter, Owners, or the Ship anſwers Damage to the Merchant, an Action lies well againſt him.

1 Sid. 236. In a Suit for Mariners Wages 'twas agreed, That, if the Ship do not return, but periſhes by Tempeſt, Enemy's Fire, *&c.* the Mariners ſhall loſe their Wages; for if the Mariners ſhall have their Wages in theſe Caſes, they will not uſe their beſt Endeavours, nor hazard their Lives to preſerve the Ship, 1 *Sid.* 179. But if the Ship unlade, they ſhall have their Wages; in the Caſe of *Cullen* and *Mico*, 1. *Keeble* 831.

XI. If a *Mariner* takes up Monies or Clothes, and the ſame is entred in the Purſer's Book, by the Cuſtom *Marine* it is a Diſcount or a Receipt of ſo much of their Wages as the ſame amounts to; and in an Action brought by them for their Wages, the ſame ſhall be allowed, and is not accounted mutual, the one to bring his Action for the Clothes, and the other for his Wages.

Paſch. 27 Car. in B. R. Pidgeon adſect. Argee per L. C. J. *Hales.* *Leg. Oleron. cap.* 13. XII. A Maſter of a Ship may give moderate and due Correction to his *Mariners*, and if they bring an Action againſt him, he may juſtifie the ſame at the *Common Law*; and by the Law of *Oleron*, if a *Mariner* ſhall aſſault the Maſter, he is to pay 5 *Solz*, or loſe his Hand.

Per Leg. Oleron. cap. 18. *Mariners* after they have unladen the Ship, if they demand their Wages, and there be any Intention of their Departure, the Maſter may detain a reaſonable Proportion of the ſame till they bring back the Ship, or give Caution to ſerve out the whole Voyage.

XIII. *Barratry* of the *Mariners* is a Diſeaſe ſo Epidemical on Ship-board, that it is very rare for a Maſter, be his Induſtry never ſo great to prevent it; a Span of Villany on Ship-board ſoon ſpreads out to a Cloud, for no other Cauſe but of that circular Encouragement that one knaviſh *Mariner* gives another.

Juſt. de ob. quæ ex dilect. §. Fin. However the Law does in ſuch Caſes impute *Offences* and *Faults* committed by them to be *Negligences* in the Maſter; and were it otherwiſe, the Merchant would be in a very dangerous Condition.

The

The Reaſons why they ought to be Reſponſible, are, for that the *Mariners* are of his own chuſing, and under his Correction and Government, and know no other Superiour on Ship-board but himſelf; and if they are Faulty, he may correct and puniſh them, and juſtify the ſame by Law: And likewiſe if the Fact is apparently proved againſt them, may reimburſe himſelf out of their Wages. *Paſch. 11. Ja. in B. R. Hern versus Smith.* Rolls Abridg. 530.

XIV. And therefore in all Caſes, whereſoever the Merchant loads aboard any Goods or Merchandiſe, if they be Loſt, Imbezled, or any other ways Damnifyed, he muſt be Reſponſible for them; for the very lading them aboard makes them liable, and that as well by the *Common Law* as the *Law Marine.* *Naut. Caup. Stab. Leg.* 1. §. 3, 6, & 7. 1 *Ven.* 190, 238. *Raym* 220. 1 *Mod.* 85. 2 *Leo.* 69.

XV. Nay, if his *Mariners* go with the Ship-Boat to the Key or Warſe to fetch Goods on Ship-board, if once they have taken Charge of them, the Maſter becomes immediately Reſponſible, if they Steal, Loſe, Damnifie or Imbezle them. *Gloſſ. ſupereod. Sect. verb. & factum.*

XVI. The ancienteſt Record that is found extant, is that in *Edward* the Third's time, where one brought an Action of Treſpaſs againſt the Maſter for the Imbezlement by his *Mariners* of twenty two Pieces of Gold, Bow, Sheaf of Arrows, Sword, and other things, and adjudged he ſhould anſwer. And for that the ſame is or may be of great Moment, accept of a Tranſcript of the Record, as the ſame was certified into *Chancery*, in order to have it ſent into the *King's Bench*, to enable the Plaintiff to bring an Action upon the ſame judgment in any Place in *England*, where he could meet with the Defendant.

Venerabili in Chriſto Patri Domino J. Dei gratia Wygorn' Epiſcopo Domini Regis Ed. Cancellario vel ejus locum tenenti ſui humiles & devoti, Robertus Gyene, Major Ville Briſtol, Edwardus Blankeit, & Johannes de Caſtlezacre Ballivi libertatum ejuſdem Ville, ſalutem cum omni reverentia & honore. De tenore & Recordi & proceſſus loquele que fuit coram nobis in Cur' Domini Regis ibidem ſine brevi inter Hen. Pilk & Jurdanum Venore Magiſtrum Navis vocat la Graciane de Bayone in pl'ito tranſgreſſ' prout per breve Domini Regis *Brevia Regis in Turre London Trin. Anno 24 E. 3. n. 45. Briſtol.*

 nobis

nobis directum fuit vobis inde certificatur, ſub ſigillis noſtris vobis ſi placet mittimus in hiis ſcriptis. Ad placit' Tolls tent ibidem die Martis prox' poſt Feſtum Epiphaniæ Domini anno Regni Regis nunc 24 Hen. Pilk quer' opt. ſe verſus Jurdanum Venore Magiſtrum Navis vocat' la Graciane de Bayone de pl'ito tranſgreſs' per' pl' &c. & unde quer', quod ſecundum legem & conſuetudinem de OLERON unuſquiſq; Magiſter Navis tenetur reſpondere de quacunque tranſgreſs' per ſervientes ſuos in eadem fact', & Johannes de Rule & Barcolet de Bornes ſervientes predicti Jurdani Magiſtri Navis predicte die Mercur. prox' ante Feſtum omnium Sanctorum Anno Regni predicti Regis Ed. 23. in Mari juxta Britan. in eadem navi de Johanne de Cornub' ſervient' predict' 22 libr' in auro, arcus, ſagit', glad. & al' bona & catalla ad valenc'. 40 l. ceperunt & aſportaverunt injuſte, &c, ad dampnum predict' Hen. 60 l' & ſi predictus Jurdanus hoc velit dedicere, predict Hen. paratus eſt verificare, &c. Et predictus Jurdanus venit & dicit quod lex de Oleron talis eſt quod ſi aliqua bona & catalla Magiſtro alicuius Navis liberata ſunt cuſtodiend', unde idem Magiſter pro eiſdem vel pro aliqua alia re in eadem navi facta manucap', illo modo Magiſter Navis tenetur reſpondere; non alio modo, & ſup' hoc petit Judicium. Et predict Hen. dicit, quod unuſquiſque Magiſter tenetur reſpondere de quacunque tranſgreſſione per ſervientes ſuos in Navi ſua fact', & petit Judicium ſimiler. Et ſup hoc predict partes habent diem hic die Sabbati prox poſt Feſtum ſci. Hillarii prox' futur' ad audiend' Judicium ſuum, &c. Ad quem diem predicte partes venerunt & petierunt Judicium ſuum, &c. Et recitat, Recordo & proceſſu predictis in plena Curia coram Majore & Ballivis & aliis probis hominibus Ville & Magiſtris & Marinariis, viſum fuit Curiee, quod unuſquiſq; Magiſter Navis tenetur reſpondere de quacunque tranſgreſſione per ſervientes ſuos in Navi ſua facta. Ideo conſideratum eſt, quod predict' Hen. recuperet dampna ſua 40 l' verſus predict' Jurdanum per Cur. taxat' & nihilominus idem Jurdanus tranſgreſſione predicta in miſericordia.

The Judgment in this Caſe is according to Law, and ought not to have been a *capiatur*; for it is not ſuch a Treſpaſs as the King is Entitled to a Fine. *Vide* 2 *Cro.* 234. *Beedle verſus Moris*, 7 *Jac.* Co Entries the ſame, *fol.* 347.

XVII.

XVII. The Maſter ſubject to anſwer Damage, is to be underſtood in all ſuch Caſes where the Lading was brought aboard either by his Conſent or his Purſer's; for any other, or ſuch as ſhall be ſecretly brought in, not being entred in the Purſer's Book, or in the Bills of Lading, the Maſter is not obliged to ſee forth-coming, unleſs it be ſuch Goods as the Parties bring into the Ship about them, as Clothes, Money, and the like, as above, thoſe things being ſeldom entred, yet moſt commonly thoſe that are viſible, the Maſter by Law is Reſponſible for.

Leg. 1. in fin. Naut. Caup. per leg. itaque de furtis.

XVIII. So likewiſe if a Maſter forewarn a Paſſenger to keep his Goods, and that he will no ways take Care of them, and if they be loſt or purloyn'd by the Crew, he will not be obliged to ſee them forth-coming; the Maſter is not there held Reſponſible in Caſe of a Loſs; eſpecially if there be any thing of Agreement thereunto.

Eod. Leg. in fin. Naut. Caup. & per leg. itaque de eod. edict. Bart. & Jaſon in leg. non ſolum. S. mortem de non oper.

XIX. But if Goods ſhall be ſent aboard a Ship, and the Maſter ſhall appoint a Cabin for the ſame, and deliver the Key to the Lader, and tell him he will not be Reſponſible if a Loſs happens; yet if the Goods are ſtole, he muſt notwithſtanding make Satisfaction: By the *Common Law* it ſhall bind an Inn-keeper. *Mo.* 78.

But if the Inn-keeper deſires his Gueſt to put his Goods in ſuch a Chamber under Lock and Key, *&c.* and then he will warrant, otherwiſe not, and the Gueſt leaves them in an outer Court, where they are ſtole, *&c.* the Inn-keeper ſhall not be charged.

8 *Co.* 33. *a.* *Mo.* 158.

Note, That Goods once delivered to a Maſter, the Cargo is not ſubject to be attached in his Hands, nor can any Cuſtom whatſoever ſupport the ſame; for they are in Law as it were bailed to the Ship, until the Freight and all other Charges are paid: And very much doubted whether an Attachment can be made in *London* of any Goods at all lying on Ship-board in the River of *Thames*, (which, though the Port of *London*) notwithſtanding Freight and all other Charges are paid off.

Mich. 27 *Car.* 2 *per* Lord Chief Juſtice *Hales.*

CHAP.

CHAP. IV.

Of Freight, Charter-parties, and Demorage.

I. *The various ways that Ships may be freighted at this Day.*

II. *The ancient way of Freighting.*

III. *How the ſame is governed upon the various Contracts, and of Accidents happening to Maſters or Laders preventing the Voyage.*

IV. Of *Agreements parol and in Writing, how conſtrued by the Common Law; what it is.*

V. Of *Ships laded and unladed before the Voyage begun; their becoming diſabled,* viz. *periſh in the Voyage before the ſame is compleated.*

VI. Of *Ships departure conſidered in reference to Freight and Damage.*

VII. Of *Freight ariſing on Trading Voyages, and loſt by contingent Actions, conſidered by the Common Law, and the Law Marine.*

VIII. Of *Freight becoming due upon the various ways of Contract, or general where none was agreed for.*

IX. Of *Faults ariſing from the Freighters; and of the Deceaſe of the Ship in reference to Freight.*

X. *Faults of Maſters ariſing from taking in Goods more than were contracted for; and of being forced into Ports in his Paſſage.*

XI. *Paſſengers dying, the Ships Title to their Goods and Concerns.*

XII. *The Ship in conſtruction of Law how far liable to Freight.*

XIII. *Ships taken and retaken in War, whether the ſame deſtroys the Contract.*

XIV. *Goods become loſt without Fault of the Ship, whether Freight becomes due.*

XV. Of *Freight contracted with Perſons deficient.*

XVI. Of *Ships contracted for by the Month, to be paid at the Arrival at a Port; Ship is caſt away, the Goods ſaved: Whether the Freight ought to be paid.*

XVII. *Covenant mutual in a charter Party, ſhall not be pleaded the one againſt the other. Plea that anſwers to Part only is ill. Covenant therein by ſeveral, yet brought againſt one only. Covenant by ſeveral* & quemlibet eorum, *may be brought againſt one only.*

I. IN the *Freighting* of Ships, reſpect is always had to the Ship it ſelf, or elſe to a certain Part thereof.

Again, the Merchants either Freight her by the *Month*, or the *entire* Voyage, or by the *Tun*; for it is one thing to Freight a Ship, and another thing to take certain *Tunnage* to Freight.

So

So alſo it is one thing to be a Cape-Merchant, another to be an under Freighter.

II. There was of old another way of Freighting, which was when the Merchant agreed with the Maſter for a Sum certain to convey his Goods enſured againſt all Peril; ſuch were to be reſponſible if any Detriment or Loſs happened; but that is now become obſolete. *21 E. 3 Cotton's Abridgment of the Parliament Records, fol. 63.*

III. *Freight* is governed generally by the Contract, and varies according to the Agreement, reduced generally into a Writing commonly called a *Charter-party*, executed between the Owners and Merchant, or the Maſter in the behalf of himſelf and Owners, or himſelf and the Merchant, or between them all, or elſe is Parol. *Naut. caup. Stab. &c. Leg. 1. §. quamvis que vim. Si quis navem conduxerit, inſtrumenta conſignata ſunto. Pekius com. ad Leg. Rhod. Art. 20.*

The Maſter or Owners generally covenant to provide a *Pilot* and all other Officers and *Mariners*, and all other things neceſſary for the Voyage; and for the taking in and delivering out of the Lading.

If there be an Agreement and *Earneſt*, but no Writing, if the ſame be broke off by the Merchant, he loſeth his *Earneſt*; but if the Owners or Maſter repent, they loſe double the *Earneſt*. *Per Leg. Naval. Rhod. Art. 19.*

But by the *Common Law* of *England*, the Party damnified may bring his Action of the Caſe, and recover all Damages on the Agreement. *Mich. 10. Car. in B. R. Langdon and Stock's Caſe. 1 Cro. fol. 383. Per Leg. item §. Si in Leg. loca.*

If a time be appointed by the *Charter-party*, and either the Ship is not ready to take in, or the Merchant not ready to lade aboard, the Parties are at Liberty, and the Party Damnified hath his Remedy againſt the other by Action, to recompence the Detriment.

If Part of the Lading be on Ship-board, and it happens ſome Misfortune may overtake the Merchant that he hath not his full Lading aboard at the time, the Maſter is at liberty to contract with another, and ſhall have Freight by way of Damage for the time that thoſe Goods were aboard after the time limited; for ſuch Agreements being of a *Conditional nature Precedent*, a Failure as to a compleat Lading, will determine the ſame, unleſs afterwards *affirmed by Conſent*. And though it be no Prudence for every Merchant or every Maſter to depart from the Contract, if it ſhould ſo fall out that the Agreement as to the Lading is not performed according to Promiſe, (ſeldom or ever done if any Part be aboard) yet it is

the

the higheſt Juſtice, that Ships and Maſters ſhould not be Infettered but Free, for otherwiſe by the bare lading of a *Cask* or *Bale*, they might be defeated of the Opportunity of *Paſſage* or *Seaſon* of the Year.

Mich. 10 *Car. in B. R. Langdon* and *Stock's* Caſe, *Cro.* 1. *part, fol.* 383. 3 *Levinz.* 238. *Per Leg. ſi ex conduct. & Leg. ſi item fundus & Leg. hæc diſtinctio.* *Per Leg. Oleron. cap.* 21.

So on the other hand, if the Veſſel is not ready, the Merchant may ſhip aboard in another Veſſel the Remainder of his Goods, and diſcharge the firſt Skipper, and recover Damages againſt the Maſter or Owners for the reſt. This is grounded upon the like Reaſon as the former.

And therefore by the *Law Marine*, Chance, or ſome other notorious Neceſſity will excuſe the *Maſter*; but then he loſeth his Freight till ſuch time as he *breaks ground*, and till then he ſuſtains the Loſs of the Ship.

But if the Fault be in the Merchant, he then muſt anſwer the Maſter and the Ship's Damage, or elſe be liable to entertain the Ship's *Crew* ten Days at his own Charge; but if after that, then the full Freight: And if any Damage happens afterwards, the Merchant muſt run the Riſque of that, and not the Maſter or Owners. (*a*) But by the *Common Law*, ſo long as the Maſter hath the Goods on Ship-board, he muſt ſee them forth-coming.

Art. 25. *Legem Naval. Art.* 29. *eod.* (*a*) 1 *Mod.* 85. *Raym.* 220. 1 *Ven.* 190, 238. 2 *Keb.* 866. 3 *Keb.* 72, 112, 132, 135.

IV. *Charter-parties* have always, by the *Common Law*, had a genuine Conſtruction as near as may be, and according to the Intention and Deſign, and not according to the literal Senſe of Traders, or thoſe that Merchandize by Sea, yet they muſt be regularly pleaded; and therefore in an Action of Covenant on an Indenture dated 9 *Oct.* 38 *El.* wherein was recited, whereas by Indenture of *Charter-party* dated *Sep.* 8. 38 *Eliz.* between the Plantiff and *Francis Cherry*; the Plaintiff having hired of him a Ship, for a Voyage to *Dantzick*, upon taking the Ship it was agreed between them, that the Ship ſhould be laden with Corn to *Dantzick*, and to ſail to *Legborn*. Now by the ſaid Indenture, in Conſideration the Plaintiff had agreed, that the Defendant ſhould have the Moiety of Corn, *quod tunc fuit*, or afterwards ſhould be laden in the Ship during the ſaid Voyage, the Defendant covenanted to pay the Moiety of the Money for the ſaid Corn, *quod tunc fuit*, or afterwards ſhould be laden, *&c.* and alledgeth *in facto*, that *Oct.* 9. 38 *Eliz.* the Ship was laden with 60 Laſts of Corn, and for not Performance of this Covenant the Action was brought; the Defendant pleaded that the

the Deed was ſealed and delivered *Oct.* 28. 38 *Eliz.* & *quod ad tunc vel poſtea* there was not any Corn laden there, and traverſeth the Delivery *Oct.* 9. or at any Time afterwards before the 28 *Oct.* 38 *Eliz.* And it was adjudged upon Demurrer, That in regard the Plaintiff declared upon a Deed dated *Oct.* 9. 39 *Eliz.* it ſhall be intended to have its Eſſence and Delivery at that time, and no other; and if he ſhould confeſs it to be delivered at any other time, it would be a Departure from his Declaration, and the Word *tunc* is referred to the Delivery, and not to the Date; and if it were Delivered ten Months after the Date, he ſhould not have the Benefit of the Corn laden before the delivery: And therefore the Defendant was adjudged not to be charged with paying for any Corn before the Delivery of the Deed, the Words of the Deed being, that he ſhould pay for the Corn then laden, &c. which (*then*) is referred to the time of the Eſſence of the Deed by the Delivery, and not to the Date. *Mich.* 8 *Jac. in B. R. Offely verſ.* Sir *Baptiſt Hix*, *Cro.* 2. *part*, *fol.* 263.

Atkinſon did Contract with *Buckle* for the Carriage of 100 Quarters of Barley, and did promiſe to deliver unto him the 100 Quarters of Barley, a Ship-board at *Barton* Haven, in the County of *York*, to carry them for him, and for the Carriage thereof did promiſe to pay to him ſo much; and *Buckle* promiſed to carry the ſame for him, and accordingly brought his Ship to the ſaid Haven, expecting there the Delivery of the 100 Quarters of Barley; but *Atkinſon* came not to deliver the ſame to him, whereupon *Buckle* brought his Action of the Caſe upon the promiſe, and upon *non aſſumpſit* pleaded had a Verdict and Judgment, which was affirmed upon a Writ of Error. 3 *Bulſt.* 152. 1 *Ro.* 312.

Charter Party & *Charta partita*, is all one in the Civil Law, with an Indenture at the Common Law. It ſettles the Agreement and Bills of Lading, the Contents of the Cargo, and binds the Maſter to deliver them well Conditioned at the place of dicharge, according to the Contents of the Charter Party or Agreement; and for Performance, the Maſter obliges Himſelf, Ship, Tackle, and Furniture, to ſee the ſame done and performed. *What it is.* *Vide Cow. Interp. verb.* Charter party.

Covenant upon a Charter Party between *Bolton* Owner, and *Lee* and *Morgan* Merchants, Freighters of a Ship, by which *Bolton* put to Freight the Ship in a Voyage to *Guinea* at 48 *l. per Menſem*, and there was a mutual Covenant *inter A.* of the one Part, and *B.* and *C.* on the other, &

quemlibet eorum, and the Action brought againſt one only, and well.

Covenant between the Parties & *quemlibet eorum modo ſequente*, and then divers Covenants follow concerning the Ship's Tackle and Performance of the Voyage; and then a Covenant for the Payment of the Freight (*viz.*) when the Ship arrived at *Guinea*, the Freight then due was upon Notice to be paid in *England*, and when ſhe arrived in *England* the Reſidue from the time of the laſt Payment was to be paid. And ſaith that at ſuch a time the Ship arrived, and that 6 Months and 10 Days were then paſt, which came to ſo much, whereof Notice was given; and that after ſuch a time the Ship arrived at *England*, and that the Freight for 6 Months, from the time of the laſt Payment, and the Freight came to 287*l.* 4*s.* and that the Defendant had not paid any of the Sums, upon which the Defendant demurred. And took theſe Exceptions to the Declaration.

1 Mod Caſ 154. Salk. 393, pl. 2.

1. For this that the Action is brought againſt one of the Defendants only, omitting the other, *ſed non allocatur* the Covenant being between them & *quemlibet eorum* is joynt and ſeveral of every Part.

2. For that it appears upon Computation, the Plaintiff demanded more upon the firſt Breach than is due by 30*s.* and leſs than is due upon the ſecond by 16*s.* and tho' that the firſt may be cured by the Juror's finding leſs, or by the Plaintiff's releaſing the Overplus, yet where he demands leſs than his due, it is incurable; and cited ſeveral Books there quoted for that purpoſe in Aſſumpſit, where, as in this Caſe, only Damages are to be recovered; and on the other Part was cited 2 *Cro.* 498. *Pemberton & Shelton, &* 529. *Parker & Curſon & uxor.* ſee like 2 *Levins* 4. *Hulme & Sambers, and* 2 *Vent.* 129. *Welby & Phillips, Hale Ch.* Juſtice took a Difference between this Caſe of Covenant and Debt, and held that after Verdict it had been cured without queſtion, but upon Demurrer there may be ſome Doubt, the Demurrer being general, but had the Demurrer been ſpecial it had been ill, and ruled Judgment, *pro Quer. Bolton & Lee,* 2 *Levinz.* 56. & 3 *Keeble* 39. & 50.

Ad Leg. Rhod.

V. If Goods are fully laded aboard, and the Ship hath *broke Ground*, the Merchant on Conſideration afterwards reſolves not on the *Adventure*, but will unlade again; by the *Law Marine* the Freight is due.

And

And if the Ship in her Voyage becomes *unable* without the Maſters Fault, or that the Maſter or Ship be Arreſted by ſome Prince or State in her Voyage, the Maſter may either *mend his Ship, or Freight another*. *Judg. Oleron. Leg. ult. ad. Rhod.*

But if the Merchant will not agree to the ſame, then the *Freight* becomes due for ſo much as the Ship hath *Earned*; for otherwiſe the Maſter is liable for all Damages that ſhall happen. And therefore if that Ship, to which the Goods were tranſlated, periſhed, the Maſter ſhall anſwer; but if both the Ships periſh, then he is diſcharged. *Digeſt. Paulus. l. 14. c. 2. §. 10.*

But if there be extream Neceſſity, as that the Ship is in a ſinking Condition, and an empty Ship is paſſing by, or at hand, he may tranſlate the Goods; and if that Ship ſink or periſhes, he is there excuſed: But then it muſt be apparent that that Ship ſeemed *Probable* and *Sufficient*.

VI. If a ſet time be fixed and agreed upon between the Merchant and the Maſter, wherein to begin and finiſh his Voyage, it may not be altered by the *ſupra Cargo*, without ſpecial Commiſſion for that Purpoſe. *Leg. qui Romæ Sect. Callimachus, ff. de verb. obl.*

If a Maſter ſhall weigh Anchor, and ſtand out to his Voyage after the time covenanted or agreed on for his Departure, if any Damage happens at Sea after that time, he ſhall refund and make good all ſuch Misfortune; yet if a *Charter-party* is made, that the Plaintiff ſhall ſail from *London* to *Lisbon* with the firſt Wind and Opportunity, *&c.* in Conſideration of which the Merchant did covenant to pay ſo much for Freight; the Ship departs not with the firſt Wind and Opportunity, yet afterwards *breaks Ground*, and arrives at her Port, the Freight in this Caſe is become due; for there is nothing can bar the Ship of her Freight but the not Departure, for only that in Law is traverſable, being material to avoid the Payment of Freight; but to ſay the Ship did not depart with the next Wind, is but a Circumſtance which in ſtrictneſs of Law is not traverſable. *Popham. 161. Palm. 398. Latch. 12. 49.*

If it be agreed that the Maſter ſhall ſail from *London* to *Legborn* in two Months, and Freight accordingly is agreed on, if he begins the Voyage within the two Months, tho' he does not arrive at *Legborn* within the time, yet the Freight is become due. *Angl. Alex. & Jaſon in dict. S. Callimachus.*

VII. If the Ship is freighted from one Port to another Port, and thence to a third, fourth, and ſo home to the *Leg. Relegati ff. de pœnis & Leg. ult. de Sep. vio.*

Port

Port from whence ſhe firſt ſailed, (commonly called a *Trading Voyage*) this is all but one and the ſame Voyage, ſo as it be in the Conformity to the *Charter-party*.

Trin. 9. *Jac.* in C. B. *Rot.* 638. *Bright verſus Cooper, Brown.* 1 *part* 21.

A Merchant agees with a Maſter, that if he carries his Goods to ſuch a Port, he will then pay him ſuch a Sum; in the Voyage the Ship is aſſaulted, entred and robb'd by Pirates, and part of her Lading taken forth, and afterwards the Remainder is brought to the Port of diſcharge, yet the Sum agreed upon is not become due, for the Agreement is not by the Maſter performed.

Co. 1 *part.* 97. *Shelley's* Caſe. *Reginer* and *Fogaſſa's* Caſe. *Plowden com.* But a Pirate is not an Enemy. *Vide* Chap. *Piracy.*

But by the *Civil Law* this is *vis major* or *caſus fortuitus*, there being no Default in the Maſter or his Mariners, and the ſame is a Danger or Peril of the Sea, which if not in Naval Agreements expreſt, yet is naturally implyed: For moſt certain, had thoſe Goods, which the Pirates carried away in ſtreſs of Weather, *Navis levandæ cauſa*, been thrown over-board, the ſame would not have made a Diſability as to the Receipt of the Sum agreed on; for by both the *Common Law* and the *Law Marine*, the Act of God, or that of an Enemy, ſhall no ways work a Wrong in Actions private.

VIII. If a Ship be freighted by the Tun, and ſhe is full laden according to the *Charter-party*, the Freight is to be paid for the whole; otherwiſe but for ſo many Tun as the Lading amounted to.

Leg. ſi quis Cod. de juſtit. & ſubſtit.

If Freight be contracted for the lading of certain Cattel, or the like, from *Dublin* to *Weſt-cheſter*, if ſome of them happen to die before the Ship's Arrival at *Weſt-cheſter*, the whole Freight is become due as well for the dead as the living *.

* *Arg. Leg. ſcio ff. de annis legat. & leg. illis libert. in fin. ff. de condit. & demon. Arg.* 7.

But if the Freight be contracted for the tranſporting them, if Death happens, there ariſeth due no more Freight than only for ſuch as are living, at the Ship's Arrival at her Port of Diſcharge, and not for the Dead †.

† *Leg. qui operas & Leg. ſi ædes* §. *cum quidam &* §. *fin. ff. locati Leg. ſed & addes in* §. *Si quis mulierem ff. locat.*

If the Cattel or Slaves are ſent aboard, and no agreement is made either for lading or tranſporting them, but generally, then Freight ſhall be paid as well for the Dead as the Living.

If Freight be contracted for the tranſporting of Women, and they happen in the Voyage to be delivered of Children on Ship-board, no Freight becomes due for the Infants.

The

The *Charter-party* does ſettle the Argreement, and the Bills of Lading the Contents of the Cargo, and binds the Maſter to deliver them well Conditioned at the Place of Diſcharge, according to the Contents of the *Charter-party* or Agreement; and for Performance, the Maſter obliges Himſelf, Ship, Tackle and Furniture to ſee the ſame done and performed.

There are 3 Bills of lading always made, the one to be ſent over Sea to him whom the Goods are conſigned to, the other for the Maſter, and the laſt for the Merchant or Lader.

If Goods are ſent aboard, generally the Freight muſt be according to Freight for the like accuſtomed Voyages.

If a Ship ſhall be Freighted and named to be of ſuch a Burden, and being Freighted by the Tun, ſhall be found leſs, there ſhall no more be paid than only by the Tun for all ſuch Goods as were laded aboard.

If a Ship be Freighted for two hundred Tuns or thereabouts, the addition of *thereabouts* is commonly reduced to be within five Tun, more or leſs, as the Moiety of the number *Ten*, whereof the whole number is compounded.

If a Ship be Freighted by the great, and the Burden of it not expreſt, yet the Sum certain is to be paid.

Chaſe & Jones verſ. Lovering. Styles 220. *Leg. penult.* §. 9. *F. de locat.*

IX. If the Ship, by reaſon of any Fault ariſing from the Freighter, as lading aboard prohibited or unlawful Commodities, occaſions a Detention, or otherwiſe impedes the Ship's Voyage, he ſhall anſwer the Freight contracted and agreed for.

If a Ship be Freighted *out* and *in*, there ariſes due for Freight, nothing, till the whole Voyage be performed: So that if the Ship die, or is caſt away coming home, the Freight outwards, as well as inwards becomes loſt.

Trin. 9. *Jac. B. R. Bright. verſus Cowper, Brownlow,* 1 *part.* 21. *Leg. Oleron. Leg. Naval. Rhod. Art.* 25.

13th *July*, 1680, in Chancery, a Part-Owner of a Ship ſued the other Owners, for his Share of the Freight of the Ship which finiſht her Voyage; but the other Owners ſet her out, and the Complainant would not join with them in ſetting her out, or in the Charge thereof; whereupon the other Owners complained in the Admiralty; and by Order there, the other Owners gave Security, That if the Ship periſhed in the Voyage, to make good to the Plaintiff his Share, or to that effect; in ſuch a Caſe, by the Law Marine, and Courſe of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir *Lyonel Jenkins* to

certiſy the Courſe of the Admiralty, who certified accordingly, and that it was ſo in all places, for otherwiſe there would be no Navigation, whereupon the Plaintiff's Bill was diſmiſt. See more of Freight, and the Incidents thereunto, *lex Mercatorum* 100.

X. If a Maſter freights out his Ship, and afterwards ſecretly takes in other Goods unknown to the firſt Laders, by the Law *Marine* he loſes his Freight; and if it ſhould ſo fall out, that any of the Freighter's Goods ſhould for Safety of the Ship be caſt over-board, the reſt ſhall not become ſubject to the Averidge, but the Maſter muſt make good that out of his own Purſe: But if the Goods are brought into the Ship ſecretly againſt his Knowledge, it is otherwiſe; and Goods ſo brought in, the ſame may be ſubjected to what Freight the Maſter thinks fitting.

Conſol. del Mer.

If the Ship puts into any other Port than what ſhe was freighted to, the Maſter ſhall anſwer Damage to the Merchant; but if forced in by Storm, or by Enemy, or Pirates, he then muſt ſail to the Port conditioned at his own Coſts.

Leg. Oleron.

Rule. *Generally the touching at ſeveral Ports by Agreement, imports not a Diverſity, but a Voyage entire.*

XI. If Paſſengers having Goods, happen to die on Shipboard, the Maſter is to *Inventory* their Concerns, and the ſame may a Year keep; and if none claim the ſame, the Maſter becomes Proprietor defeaſable: But the Bedding and Furniture of the Parties become the Maſter's and his Mates, and the Clothing are to be brought to the Ship-Maſt-head, and there praiſed and diſtributed amongſt the *Crew*, as a reward for their Care of ſeeing the Body put into the Sea.

Leg. Conſolat. del Merc.

XII. The Lading of the Ship in Conſtruction of Law, is *tacitly* obliged for the Freight, the ſame being, in Point of Payment, preferred before any other Debts to which the Goods ſo laden are liable, though ſuch Debts, as to time, were *precedent* to the Freight; for the Goods remain as it were bailed for the ſame: Nor can they be *attached* in the Maſter's Hands (though vulgarly it is conceived otherwiſe.)

Bald. in leg. certi juris in 4. Q. in verb. Quid ergo Cod. locat.

Ships deſerve *Wages* like unto a Labourer; and therefore in the Eye of the Law, the Actions touching the ſame,

ſame, are generally conſtrued favourably for the Ship and her Owners: And therefore if four Part-Owners of five, ſhall make up their Accounts with the Freighters, and receive their Proportions, yet the fifth Man may ſue ſingly by himſelf without joyning with the reſt; and this as well by the *Common Law* as the *Law Marine.*

Hill. 26. 27. *Car.* 2. *in B R. Stanley verſus Ayles* by *Hales, Keeble* 3 *Rep.* 444.

XIII. A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battel is re-taken by another Ship in Amity, and Reſtitution is made, and ſhe proceeds on in her Voyage, the Contract is not determined, though the taking by the Enemy diveſted the Property out of the Owners; yet by the Law of War that Poſſeſſion was defeaſeable, and being recovered in Battel afterwards, the Owners became re-inveſted: So the Contract by Fiction of Law, became as if ſhe never had been taken, and ſo the entire Freight becomes due.

7 *R.* 2 *Statham* Abridg. 54.

In Jure Poſtliminii leg. retor. & leg. in bello, §. 1.

Covenant by a Charter Party, that the Ship ſhall return within the River of *Thames* by a certain time (*periculis & caſualitatibus Marium, Anglice,* Dangers of the Sea, *exceptis*) and after in the Voyage, and within the time of the return, the Ship was taken upon the Sea, *per homines bellicoſos modo guerrino arraiatos,* to the Covenantor unknown, *&c. & abinde huc uſq; detenta fuit* by them, *per quod* he could not return within the River of *Thames* within the time mentioned in the Covenant. Reſolved this Impediment was within the Exception, for theſe Words intend as well any Danger upon the Sea by Pirates and Men of War, as Dangers of the Sea by Shipwrack, Tempeſt, or the like. *Pickering* and *Barkley, Stiles* 132. & 2 *Roll*'s Abr. 248.

XIV. If Freight be taken for 100 Tuns of Wine, and twenty of them leak out, ſo that there is not above eight Inches from the Buge upwards, yet the Freight becomes due: One Reaſon is, becauſe from that Gage the King becomes Entitled to Cuſtom; but if they be under 8 Inches, by ſome it is conceived to be then in the Election of the Freighters to fling them up to the Maſter for Freight, and the Merchant is diſcharged. But moſt conceive otherwiſe; for if all had leak'd out, (if there was no Fault in the Maſter) there is no Reaſon the Ship ſhould loſe her Freight; for the Freight ariſes from the

Boyce verſ. Cole ſen. & Cole jun. Hill. 26. 27 *Car.* 2. *in B. R.*

Tunnnage taken, and if the Leakage was occaſioned through Storm, the ſame perhaps may come into an Averidge. Beſides, in *Bourdeaux* the Maſter ſtows not the Goods, but the particular Officers appointed for that Purpoſe, *quod nota*. Perhaps a ſpecial Convention may alter the Caſe.

Moſt certain, if a Ship freighted by the Great, be caſt away, the Freight vaniſhes; but if by the Tun or Pieces of Commodity, and ſhe happens to be caſt away, afterwards Part is ſaved; doubted whether *pro rata* ſhe ought not to be anſwered her Freight.

When ſuch a Misfortune happens, the Enſured commonly tranſfer thoſe Goods over to the Aſſurors, who take them towards Satisfaction of what they pay by Virtue of their Subſcriptions.

Debt upon a Charter Party upon a Penalty, the Covenant was to pay ſo much *per* Tun for Freight, and Breach was aſſigned in *non* Payment, for ſo many Tun and an Hogſhead, which came to ſo much: Upon Demurrer 'twas held the Declaration was Ill, for the Covenant is only to pay ſo much *per* Tun; *aliter* if it had been to pay *ſecundum ratam* of ſo much *per* Tun. *Rea* against *Barns*, 2 *Levinz*. 124. 3 *Keeble* 421.

Rilv. 134.

XV. If a Merchant takes Freight by contracting with a Mariner that is not a Maſter, if Loſs happens, he muſt be contented to ſit down without any Remedy againſt the Owners; but perhaps ſuch a Mariner for ſuch an Act may ſubject himſelf to an Action.

Coke 4 *Inſtit. fol.* 146.

But if there be a Fault committed by a Mariner which was hired, or put in by the Maſter or Owners; there for Reparation the Owners become liable.

Johannes Locinius, l. 3. *c.* 8.

XVI. The Maſter is not bound to anſwer Freight to the Owners for Paſſengers, if they are found to be unable to pay.

If Ship by *Charter-party* reciting to be of the burden of 200 Tuns is taken to Freight for a Sum certain, to be paid at her return, the ſum certain is to be paid, though the Ship amounts not to that Burden.

If a Ship is freighted after the rate of 20 *l.* for every Month that ſhe ſhall be out, to be paid after arrival at the Port of *London*; the Ship is caſt away coming up from the *Downs* but the Lading is all preſerved; yet the Freight

is

is become due: For the Money ariſes due monthly by the Contract, and the Place mentioned is only to ſhew where payment is to be made, for the Ship deſerves wages like a Mariner, who ſerveth by the Month; and though he dies in the Voyage, yet his Executors are to be anſwered *pro rata*. Beſides, the Freight becomes due by intendment on the delivery or bringing up of the Commodities to the Port of *London*, and not of the Ship.

If a Man freights a Ship out, and covenants that the Ship with the firſt Wind and Opportunity ſhould ſail out of that Port to *Cales*, and the Freighter covenants that he for the Freight of all the Premiſſes would pay unto the Maſter 184 *l.* *pro tota transfretatione omnium premiſſarum*, if the Maſter doth not aver that the Ship did arrive at the Port of *Cales*, he cannot maintain an Action againſt the Freighter. If the Maſter enters into a *Charter-Party* for himſelf and Owners, the Maſter in that caſe may releaſe the Freighters without adviſing with the Owners; but if the Owners let out to Freight ſuch a Ship whereof *J. S.* is Maſter, though the Maſter Covenant in the ſame *Charter-party* and Subſcribes, yet his Releaſe in that caſe will not bind the Owners, but the Owners releaſe on the other hand will conclude the Maſter: And the reaſon is, for that the Maſter is not made a proper Party to the Indenture. And ſo it was ruled, where an *Indenture* of *Charter-party* was made between *Scudamore* and other Owners of the good Ship called the *B.* whereof *Robert Pitman* was Maſter on the one Party, and *Vandenſtene* on the other Party; in which Indenture the Plaintiff did covenant with the ſaid *Vandeſtene* and *Robert Pitman*, and bound themſelves to the Plaintiff and *Robert Pitman* for performance of Covenants in 600 *l.* and the Concluſion of the Indenture was,——*In witneſs whereof* the ſaid *Robert Pitman* put his Hand and Seal, and delivered the ſame; in an Action of Covenant for not performing certain Covenants in this Indenture, the Defendant pleaded the Releaſe of *Pitman*; whereupon the Plaintiff demurred: And it was adjudged, That the Releaſe of *Pitman* did not bar the Plaintiff, becauſe he was no party to the Indenture; and the diverſity in that caſe was taken and agreed between an Indenture reciprocal between Parties on the one ſide, and Parties on the other ſide, as that was; for there no

1 *Bulſtr.* 167. 1 *Inſt.* 204. *a.* *Dy.* 76. *a.* *Hob.* 41. 2 *Saund.* 350.

3. *Cro.* 56. *Scudamore & al' verſus Pitman. Trin.* 29. *Eliz. in B. R.* cited in *Coke* 2 *Inſtit. fol.* 673. Agree. 2 *Levinz* 74. *Cook & Child* & 3 *Levinz.* 138. *Gilby verſus Copley. que ſemb. contra.*

Bond, Covenant or Grant can be made to or with any that is not party to the Deed; but where the Deed indented is not reciprocal, but is without a *Between, &c.* as *Omnibus Chriſti fidelibus, &c.* there a Bond, Covenant or Grant may be made to divers ſeveral Perſons.

If an Indenture of *Charter-party* be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants of the other Part, and *A.* only Seals the Deed of the one Part, and *C.* and *D.* of the other Part; but in the Indenture it is mentioned that *A.* and *B.* Covenant with *C.* and *D.* and *C.* and *D.* Covenant with *A. B.* in this Caſe *A.* and *B.* may join in an Action againſt *C.* and *D.* tho' that *B.* never Sealed the Deed, for he is a Party to the Deed, and *C.* and *D.* have Sealed the other Part to *B.* as well as to *A.* *Clement* againſt *Henley*, 2 *Rolls Abr.* 22.

Covenants mutual ſhall not be plead-ed one againſt the other.

XVII. Covenant upon a *Charter-party*, by which the Maſter of the Ship covenants to Sail with the firſt fair Wind to *Barcelona*, and that the Mariners ſhall attend with a Boat to relade the Ship, and then to return with the firſt fair Wind to *London*, and to unlade and deliver the Goods, and the Merchants covenant to pay ſo much for Freight, and ſo much for Demorage every day; the Maſter brought his Action for the Freight and Demorage, and declares that he ſailed ſuch a Day with the firſt fair Wind, and upon all the other Points. The Defendant *quoad* the Freight that the Ship did not return directly to *London*, but went to *Alicant* and *Tangier* and made divers Deviations, and by theſe delays the Goods were ſpoiled, and as to the Demorage, that this was occaſioned by the Negligence of the Mariners in not attending with the Boat to relade the Ship; to which the Plaintiff demurred, and *per Curiam pro Quer.* for that the Covenants are mutual and reciprocal, upon which each ſhall have his Action againſt the other, but ſhall not plead the breach of one in bar of another, for perhaps the damage of the one ſide and of the other are not equal. 3 *Levinz.* 41. *Cole contra Shallet.* Sir *Tho. Jones* 216. *Showers* againſt *Cudmore.*

Plea that anſwers to Part only is Ill.

In Covenant the Plaintiff declared, that he Covenanted to ſail with a Ship to *D.* in *Ireland*, and there to take 280 Men of the Defendants, and to carry them to *Jamaica*,

ca, and the Defendant Covenanted to have the 280 Men there ready, and to pay for their carriage 5 *l.* for each Man, and that the Defendant had not the 280 Men ready, but that he had 180, which he took on Board, and carried them, but that the Defendant had not paid for them, the Defendant pleaded that he had the 280 Men ready, and tendered to the Plaintiff, who refuſed to receive 'em, but ſaid nothing as to the carrying of the 180 Men, nor to the Payment for them; and for that it was not a Plea to all, Judgment was given for the Plaintiff upon Demurrer, 1 *Levinz*, 16. *Thomſon verſus Noell*, & 1 *Keeble* 100.

Cro. El. 268. *pl.* 3. 330 *pl.* 10. 433, 434. *Cro. Jac.* 27. 1 *Saund.* 27, 28. 2 *Saund.* 127. *Latw.* 1492.

CHAP. V.

Of Wreck.

I. *Of Goods wreckt, as in relation to the Alteration of the Property by the Civil Law.*
II. *Of the Preſervation of Goods* wreckt, *and the Puniſhment of thoſe that ſhall add Miſery to the Condition of ſuch Perſons ſo diſtreſs'd.*
III. *Of Goods* wreckt, *their Preſervation according to the Laws of* Oleron, *and of* England, *and of the Puniſhment of thoſe that ſhall not make Reſtitution.*
IV. *Of Contribution where the Ship periſhes, and the Goods are all ſaved, and where not.*
V. *The King of* Great Britain's *Prerogative as in relation to* Wreck *and other Royalties of the Sea.*
VI. *Of* Flotſam, Jetſam *and* Lagan *where the King ſhall have the ſame, and whether by the Grant of* Wreck *the ſame paſſes; and where a Subject may preſcribe.*
VII. *Of Ships* wreckt *and no Creature in them, yet no* Wreck; *and of Ships forſaken, whether in Law accounted loſt or wreck, or neither.*
VIII. *Of the Sheriff's Duty as in relation to Goods* wreckt; *and of Owners their time of claiming their Property.*
IX. Wreckt *Goods not to pay Cuſtom.*
X. *Of* Wreck, *in the* Iſle *of* Wight, *not in the Admiral without ſpecial Words.*

I. IN matters of *Wreck* there is, as it were, a Contract between them which have loſt their Goods by ſuch Miſfortune, and them upon whoſe Lands the Goods and Mer-

chandize are driven, that the ſame be reſtored to them or thoſe that claim under them. And therefore by the *Civil Law*, it is preciſely forbid, that no Man ſhall meddle with ſuch Goods as are Wreckt; and ſuch as are proved to have ſtoln any thing thereout, are holden for Robbers; for that ſuch Goods being caſt on Land and recovered out of the Sea, remain ſtill his who was the Owner thereof, and deſcend upon his Succeſſor; neither Eſcheat to the King, neither to any other to whom the King hath granted ſuch Royal Privilege.

Leg. ne quid ff. de incendior, ruina & naufragio.

Leg. 44. D. de acq. rer. dom.

The reaſon why the Laws were ſo ſtrictly declared by the *Romans*, was, for that by the Laws of *Rhodes*, if any Ship had become Wreck, though all the Perſons were ſaved and alive, yet the Ship and Goods became ſeiſible by the Lord: But the ſame being barbarous, was afterwards repealed and abrogated.

The Emperor *Conſtantine* the Great, ſays in this Caſe, if any Ship at any time by any Shipwrack be driven to the ſhore, or touch at any Land, *Let the Owner have it, and let not my Exchequer meddle with it: For what right hath my Exchequer in another man's Calamity, ſo that it ſhould hunt after Gain in ſuch a woful Caſe as this is?*

Leg. 1. lib. 11. C. de Naufrag.

And yet if no Kindred appear within a Year and a Day, or appearing, prove not the Goods ſhipwrack'd to be theirs, the Goods come to the *Exchequer*, even by that Law: So much that Law condemns careleſneſs, which is written, *vigilantibus & non dormientibus, &c.* And with this agree the Laws of *Oleron* and the Laws of this Land, as taken out of thoſe Imperial Laws, in that Point, as is conceived.

II. The *Civil Law* was ever ſo Curious and Careful to preſerve the Goods of ſuch miſerable Perſons, that if any ſhould ſteal ſuch, they ſhould pay four-fold to the Owner, if purſued within a Year and a Day, and as much to the *Prince* or his *Admiral*: So careful were they, and ſo exact in requiring Reſtitution, that the very ſtealing of a Nail, or the Worth thereof, obliged the Thief to the Reſtitution of all the remaining Goods. And by the Emperor *Antonius* it was made a Law for ſuch ſort of Men, that they ſhould be batten'd and baniſh'd for three Years; but that was only for thoſe of a high and honourable Rank: But thoſe

Leg. 1. in pr. de incend. ruin. leg. in eum cum auth. ſeq. de furt. Leg. 3. in fir. de incend. ruin. naufrag.

Leg pedibus eod.

thoſe that were Baſe and Ignoble, ſhould be ſcourged and ſent to the Gallies or Metalr Mines.

And the preventing of Help to ſuch ſhipwreckt Perſons, was puniſh'd with the ſame Suffering as a Murderer. *Arg. leg. ſaculovis de Extrad. crim.*

The like for thoſe that ſhall put forth any treacherous Lanthorn or Light, with Intention to ſubject them to Danger or Shipwrack, was puniſhed with Death.

And though no Harm happens, yet he may be puniſhed: Henee it is, that Fiſhers are forbidden to fiſh with Lights in the Night, for fear of betraying Sailers. *Per leg. incend. ruin. naufrag. Leg. ne piſcator.*

And here I cannot omit the great and pious Care that His Majeſty hath had, in his Directions about Light-Houſes and Lanthorns, and other ſpecial Sea-marks; but more eſpecially in his erecting at his own Princely Charge, that moſt Excellent Light-Houſe near *Goldſton* by *Yarmouth*, which, both for Height, Curioſity and Form, is not Inferior to, if not Excelling, all, or moſt, in Chriſtendom.

III. And as the Emperor and other maritime Kingdoms, had in ſome ſort abrogated and repealed that cruel Law, and ſubjected the Violators to Puniſhment for the Inhumanity offered to ſuch diſtreſſed Perſons; ſo our Famous King *Richard*, returning from the Holy War, in his own Experience at Sea, became ſenſible of the Miſeries which Merchants and Mariners at Sea underwent, their Lives being always within few Inches, often within an Hair's Breadth of Death; and having Conſideration of their Calamities and Diſtreſſed State in his Voyage, reſolved to revoke that Law, and at *Oleron* in the Bay of *Aquitane* (then part of his Dominions, as Soveraign Lord of the Ocean, and all thoſe Maritime Kingdoms, did there, amongſt other good Marine Laws, declare, That if any Perſon or living Thing eſcaped out of any wrecked Ship to Land, it ſhould not be Wreck or Confiſcated to him or his Succeſſor, as it was before, though all the Men eſcaped alive. For before that, both in *England* and in * *Normandy*, the † Crown was Entituled to ſhipwrackt Goods, and the King *Jure Gentium* (indeed according to the *Rhodian* Law) became Heir unto them, which otherwiſe *Jure naturali* were conceived to be *in bonis nullius*, pertaining to no Owner: But now that Valiant and Religious Prince reſolved no longer to embrace ſo cruel a Prerogative, by the ſtripping the diſtreſſed Mariners of

* *Bracton, lib.* 2. *cap.* 5.
† *Cuſtuma Norman. c.* 17.

of thoſe Rags of their Eſtates, which the Mercy and Modeſty of the Waves and Winds had left them; and therefore in the Month of *October* at *Miſſena*, in the preſence of many Archbiſhops, and Biſhops, and others, he then for ever quitted the Royal Claim to Wrecks, which afterwards was declared and publiſhed at *Olèron* in his own Territories; ſo that if any Man out of the Ship came alive to ſhore, the Property of the ſhipwrackt Goods was ſtill preſerved to the Owner: Which Royal Condeſcention was ſo enlarged by our ſucceeding Kings, That if a Man, Dog, or Cat eſcapes alive out of the Ship, neither the Ship or other Veſſel, nor any thing therein ſhall be adjudged Wreck, but the Goods ſhall be ſaved and kept by the Sheriff, Coroners, or the King's Bailiffs, and delivered to the Inhabitants of the Town where the Goods are found; ſo that if any within a Year and a Day, ſue for thoſe Goods, and after prove that they were his at the time of the Shipwrack, they ſhall be reſtored to him without delay: But if not, they ſhall be ſeized by the ſaid Sheriff, Coroners or Bailiffs for the King's uſe; and ſhall be delivered to the Inhabitants of the Town, who ſhall anſwer before the Juſtices for the Wreck belonging to the King: But this good Law extends not to Pirates, Robbers, Sea Rovers, Turks, or other Enemies to the Catholick Faith.

Roger Hoveden in the latter part of his Annals, fol. 678. Jean Brompton. Chron. Coll. fol. 1887.

Weſtm. 1. c. 4. 3 E. 1.

2 Inſt. 166.

Per Leg. Oleron, cap. 47.

Where the *Wreck* belongs to another, he ſhall have it in like manner; and if any be attainted to have done otherwiſe, he ſhall ſuffer Impriſonment, make Fine to the *King*, and yield Damage alſo.

If a Baliff do it, and it be diſallowed by his Lord, the Bailiff ſhall anſwer for it if he hath wherewithal; but if not, the Lord ſhall deliver his Bailiff's Body to the King.

IV. If the Ship periſhes only, and the Goods are ſafe, in that Caſe the Goods ought to pay a Proportion of a fifth or tenth Penny, according to the eaſie or difficult Winning or Saving of the ſaid Goods. Rich Goods, as Gold, and Silver, and Silk, pay leſs than Goods of great Weight and Cumber, being in leſs Danger, unleſs it were a Wreck going into a Port, which the Skipper was not bound for, there *è contra*, then the Skipper is not to be conſidered.

Leg. 37. Naval. Rhod. & 40.

But

But if the Ship and Goods periſh in the Sea, and the Owners do totally forſake her, and ſo ſhe becomes a meer *Derelict*, in that Caſe the firſt Poſſeſſor that recovers her, or any part of her Lading, gains a *Property*; And this according to the Laws of Nations, *as is that given for loſt, whereof there is no Hopes of Recovery*, like a Lamb in the Paws of a Lion. And the incomparable *Ulpian* compares ſuch a *Dereliction* to a Man that knows his own Goods to be by another Man detained, and makes no claim unto them in a long time; unleſs ſome Cauſe do manifeſtly appear, ſeems to do it to no other Purpoſe but to ſhew that he is willing to renounce them; and this is it that *Ulpian* elſewhere intends, where he ſaith, that a Houſe poſſeſs'd for a long time by another, and no claim made, nor Rent demanded for it, ſeems to be deſerted by the right Owner.

To exact Intereſt long ſince due, ſaith the good Emperor *Antonius, is hardly juſt; for the not demanding it in ſo long a ſpace, makes it probable that thou wert willing to remit it; and that by not ſo much as demanding it, thy purpoſe was to make thy ſelf the more Beloved and Honoured, and thy Debtor the more Thankful.*

Now that Silence ſhould be of ſuch a force as to juſtify our Preſumption of a *Dereliction*, two things are requiſite; Firſt, That he that is ſilent knows that he hath a Right; for him that knows it not, Silence cannot prejudice. Secondly, That his Silence be free and voluntary, and not occaſioned by Fear, or any other ſuch Cauſe; and the true reaſon is, that it is hardly poſſible that in a long time a Man ſhould not by ſome Means or other arrive at the Knowledge of his own Right, time daily adminiſtring occaſions to the diſcovery of Truth.

But becauſe that time, which exceeds the Memory of Man, is in a moral Senſe infinite, therefore if Claim be not made within *a reaſonable time* to a thing out of Poſſeſſion, it is a ſufficient Preſumption that it *is forſaken*, unleſs ſome very ſtrong Reaſons be brought to the contrary; and therefore the recovery of the Plate near the *Bahama* Rocks, loſt near fifty Years ſince by the *Spaniard*, became moſt apparently a Derelict, and free not only for the Undertakers to recover and poſſeſs, but to keep

Grotius lib. 2. *cap.* 4. §. 5, 6.

as

Duke of *Albemarle & al. in Anno* 1687. as a Property juſtly acquired by them, as well by the Laws of Nations, as the *Civil Law*.

17 *E.* 2. *c.* 11. V. The *King* ſhall have Wreck of the Sea, Whales, and great Sturgeons taken in the Sea, and elſewhere throughout the whole Realm, except in Places privileged by the *King*.

Sir *Henry Conſtable's* Caſe, *Coke* 5 *part. fol.* 107. VI. By the Grant of Wreck will paſs *Flotſam*, *Jetſam*, and *Lagan*, when they are caſt upon the Land; but if they are not caſt upon the Land, the Admiral hath Juriſdiction, and not the *Common Law*, and they cannot be ſaid Wreck.

5 *Co.* 106. *a* *Wreccum Maris*, are ſuch Goods only as are caſt and 5 *Co.* 106. *b.* left upon the Land by the Sea.

Flotſam, is when a Ship is ſunk, or otherwiſe periſhed, and the Goods float upon the Sea.

ibid. *Jetſam*, is when the Ship is in danger to be ſunk, and for lightning the Ship, the Goods are caſt into the Sea, notwithſtanding which the Ship periſheth.

ibid. *Lagan vel Ligan*, is when the Goods being heavy, are caſt into the Sea before the Ship periſhes, which by the Prudence of the Maſter or Mariners, who have an Intent to ſave them ſo ſunk, as that they may come at them again; in order to which they faſten a Buoy or other light Matter, that may ſignifie to them where they lie, if Providence ſhould bring them in a Condition to retake them.

46 *E.* 3. 15. *Anth. Omnes perigrini communia de ſucceſſionibus acq. per Leg. Oleron* The King ſhall have *Flotſam*, *Jetſam* and *Lagan*, when the Ship periſheth, or when the Owners of the Goods are not known; but when the Ship periſhes not, *è contra*.

Coke 5. *part. fol.* 107. *Coke* 2 *Inſtit. fol.* 167. A Man may have *Flotſam* and *Jetſam* by the King's Grant; and may have *Flotſam* within the high and low Water-mark by Preſcription, as it appears by thoſe of the Weſt-Countries, who preſcribe to have Wreck in the Sea; ſo far as they may ſee a *Humber* Barrel.

Leg. 8. *D. de leg. Rhod. de* VII. If the Ship be ready to periſh, and all the Men therein, for Safeguard of their Lives, leave the Ship, and after the forſaken Ship periſhes, if any of the Men be ſaved and come to Land, the Goods are not loſt.

A Ship on the Sea was purſued by Enemies, the Men therein for Safeguard of their Lives, forſake the Ship, the Enemies take the Ship, and ſpoils her of her Goods and

and Tackle, and turn her to Sea; by ſtreſs of Weather ſhe is caſt on Land, where it happened her Men arrived: It was reſolved by all the Judges of *England*, that the Ship was no Wreck, nor loſt. 5 *R.* 2. *pro Willielmo Fiſhlake Co.* 2 *Inſt. f.* 167. *Leg.* 43. §. 11. *D. de furt.*

VIII. If Goods are caſt up as a Wreck, and it falls out they be bona peritura, the Sheriff may ſell them within the Year, and the Sale is good; but he muſt account to the true Owners. *Pl. Com.* 466.

Owners claiming the Wreck, muſt make their Proof by their Marks or Cocquets, by the Book of Cuſtoms, or by the Teſtimony of honeſt Men; and if the Wreck belongs to the King, the Party may ſue out a Commiſſion to hear and determine, and that by the Oaths of twelve Men; or elſe he may bring his Action at Law, and make out his Proof by *Verdict*; but ſuch Action muſt be brought *within the Year and Day*. *F. N. B. fol.* 112. *c.* The Year and Day ſhall be accounted from the Seiſure, 2 *Inſt.* 168. 5 *Co.* 107. *b.*

Note, *Flotſam*, *Jetſam* and *Lagan*, are Goods on or in the Sea, and belong to the King, who by Charter hath granted them to the Lord Admiral. 5 *Co.* 126. *b.*

IX. If Goods were wreckt on the Shore, and the Lord having Power, takes them, he ſhall not pay Cuſtom, neither by the *Common Law* nor by the *Statute*; for at the *Common Law*, wrecked Goods could not be charged with Cuſtom, becauſe at the *Common Law* all *Wreck* was wholly the Kings, and he could not have a ſmall Duty of Cuſtom out of that which was all his own; and by *Weſtm.* 1. where wrecked Goods belonged more to another than to the King, he ſhall have it in like manner, that is, as the King hath his. Left unreſolved in *Moor fol.* 224. But ſince adjudged in C. B. upon a ſpecial Verdict found at St. *Edmund's Bury* in *Suffolk*. *Shep. verſus Goſnold, Hill.* 23, 24 *Car.* 2. *Rot.* 615. *Vaughan, fol.* 159.

Now Goods that are chargeable with Cuſtom, according to the Act of *Tunnage and Poundage*, muſt have theſe Properties.

1. They muſt be Goods which ſhall come or be brought into the Ports or Places of the Kingdom. 12 *Car.* 2. *c.* 4.

2. They muſt come or be brought into ſuch *Ports* or *Places*, as *Merchandize* that is for ſale, and to that end; for there can be no other Conception of *Goods* brought as *Merchandize*.

3. They muſt come and be brought as *Merchandize*, and for ſale by the King's natural born Subjects, or by Strangers and Aliens, as diſtinguiſh'd from the natural Subjects.

4. The Duty payable to the King, is to be meaſured by the Quality of him that imports the Commodity; that is, if the Importer be a natural Subject, he pays leſs to the King; and if an Alien, more.

5. All thoſe Goods charged with the Duty by the *Statute*, ſo to come, or be brought into Ports or Places of the Kingdom, are to be foreign, as of the Growth of *France*, the *Levant*, *Spain*, *Portugal*, *Germany*, &c.

Whence it follows, 1. That Goods of foreign Growth, and which by their kind, are to pay Duty, if they ſhall come or be brought into the Ports or Places of the Kingdom, neither by the King's natural born Subjects, nor by Aliens, they are not chargeable with the Duties mentioned in the Act.

2. If they are not brought into the Ports and Places of the Kingdom as Merchandize, *viz.* for Sale, they are not chargeable with the Duty; but Wines or other Goods coming or brought into the *Realm* as *Wreck*, are neither brought into the Kingdom by any of the King's *Natural born Subjects*, nor by any *Strangers*, but by the Wind and Sea; for ſuch Goods want a Proprietor until the Law appoints one.

3. *Wrecked Goods* are not brought into the Kingdom, being caſt on Shore, as Merchandize, *viz.* for Sale, but are as all other the native Goods of the Kingdom, indifferent in themſelves, for Sale or other uſe at the Pleaſure of the Proprietor.

4. All Goods foreign or domeſtick, are, in their Nature, capable to be Merchandize, that is, to be ſold; but it follows not thence, that whereſoever they are brought into the Kingdom, they are brought as Merchandize, and to be ſold, and ſhould pay Cuſtom; for they are transferred from Place to Place, more for other uſes than for Sale.

5. All Goods charged with the Duty of the Act, muſt be propriated by a Merchant *Natural born*, or Merchant *Alien*, and the greater or leſs Duty is to be paid, as the Proprietor is an Alien or Native Merchant; but wrecked Goods

Goods are not the Goods of any Merchant *natural born, Alien* or *Denizen*, whereby the Duty payable ſhould be either demanded, diſtinguiſh'd, or paid: Therefore a Duty impoſſible to be known, can be no Duty; for Civilly *what cannot be known to be, is as that which is not*.

6. All Goods ſubject to the Duty of Tunnage and Poundage, may be forfeited by the Diſobedience and Miſbehaviour of the Merchant-Proprietor, or thoſe truſted by him, As *unſhipping before Payment, or lawfully tendring or agreeing for*, &c. But wrecked Goods cannot be imported into any Creek or Place of the Realm by way of Merchandize, and unſhipped to be laid on Land; for if ſo imported and unſhipped to be laid on Land, it is no Wreck, and therefore are not Goods forfeitable by the Miſbehaviour of any within the Act; and conſequently not Goods intended to be charged with the Duties by the Act.

Goods drowned or loſt in paſſing a Ferry, a great River, or an Arm of the Sea are not to be ſaid to be exported, though they be carried to Sea; but Goods exported are ſuch as are conveyed to Sea in Ships or other Naval Carriages of Man's Artifice; and by like Reaſon, Goods imported muſt not be Goods imported by the Wind, Water, or ſuch inanimate Means, but in Ships, Veſſels, and other Conveyances uſed by reaſonable Agents, as Merchants, Mariners, Sailers, *&c.* Whence it may be concluded, that Goods or Merchandize imported within the Meaning of the Act, can only be ſuch as are imported with Deliberation, and by reaſonable *Agents*, not caſually and without Reaſon; and therefore wrecked Goods are no Goods imported within the Intention of the Act, and conſequently not to anſwer the King's Duties; for Goods, as Goods, cannot Offend, Forfeit, Unlade, pay Duties, or the like, but Men whoſe Goods they are: And wrecked Goods have no Owners to do thoſe Offices, when the Act requires they ſhould be done; therefore the Act intended not to charge the Duty upon ſuch Goods.

The Admirals of *England*, *ut magnus Admirallus Angliæ, Hiberniæ, Walliæ, ac Dominiorum & Inſularum earundem, Villæ Caliſiæ & Merchiarum ejuſdem, necnon Gaſconiæ, Aquitaniæ, claſſium & Marium dictorum Regnorum Angliæ præfectus*

The very Words of the Lord *Howard's* Patent, in 28 *Eliz. in Rot. Admir. m.* 10.

ſectui generalis, &c. which are the words of their Patents uſed at this day, do claim all Wrecks ariſing from any of thoſe places, by virtue of their Grants.

And yet in the like Caſe, in all Circumſtances between *Power* and Sir. *William Portman*, *Hill.* 6. *William Com. B. Rot.* 1431. where the Judges, and more particularly Chief Juſtice *Treby*, ſeemed to be of Opinion, that Goods wreckt, or Flotſam, ſhould pay Cuſtom.

X. King *Edward* the Second, in the firſt Year of his Reign; by his Charter, granted the Caſtle of *Cariſbrook*, with all the Lands and Tenements in the *Iſle of Wight*, formerly belonging to *Iſabella Fortibus*, Counteſs of *Albermarle*, to his great Favourite *Peter de Gaveſton*, and *Margaret* his Wife, and the Heirs of their two Bodies begotten (together with ſundry other Caſtles and Lands) and commanded *Nicholas de Boſco* to put him into actual Poſſeſſion; and likewiſe commanded *Robert de Sanſon*, Keeper of the Foreſt of *Parkburſt* in that Iſle, to be intendent to them for the Farm he had granted him for Life, for the Cuſtody thereof, which being afterwards ſoon reſeized into the King's Hands, he granted this Caſtle with all its Services, and all his Lands in that Iſle, to *Edward* his Son and his Heirs Kings of *England*, and afterwards, for the aſcertaining what did of Right belong to the ſame Caſtle, an Inquiſition went out by which it was found, *inter alia* qd' wreckum Maris pertinens ad dictum Caſtrum valet per Ann. 4 s.

1 E. 2. m. 6. num. 6.

Pat. 20. E. 2. m. 10. intus pro Edvardo filio Regis.

Inquiſit. de An. 47 H. 3. n. 32.

So that, by the general Patent of the Admiral, will not paſs the Wreck of this Iſle, without ſpecial Words granted in the Patent.

Note, If the Wreck happened, or was occaſioned by reaſon of any Fault or Negligence in the Maſter or Mariners, the Maſter muſt make good the Loſs; but if the ſame was occaſioned by the Act of God, to avoid an Enemy or Pirate, and the like, there he ſhall be excuſed.

Leg. 3. §. 1. D. Naut. caup St. lib. 1. §. 4. D. de obl. & act. leg. 26. §. 6. D. mand. Quia vis major providentiam & induſtriam humanam ſuperat, niſi culpa caſum praeceſſerit.

CHAP.

Chap. VI.

Of Averidges and Contributions.

I. *Of Goods and Merchandize, when ſubject to be caſt over-board.*
II. *Of the Account rendred of ſuch ejected Goods, and by whom.*
III. *Of the ancient Laws of* England, *in reference to ſuch Ejectments.*
IV. *What Goods muſt come into the* Averidge, *and what are exempt. The Diſcription of* Averidge.
V. *The Maſter diſcharged by ſuch Acts, by the Common Law.*
VI. *The Ship's Gear or Apparel, whether within the* Averidge.
VII. *The reſidue of the Goods where tacitly obliged to anſwer the* Averidge.
VIII. *Of Goods remaining on ſhip-board, ſpoiled by reaſon of the ejecting of others, where ſubject to the* Averidge.
IX. *Where Ship and Lading are both made liable to the* Averidge.
X. *Of Misfortunes not ſubject to an* Averidge.
XI. *Where the remainder of the Goods are exempted from the* Averidge, *and the Damage of the ejected Goods falls on the Maſter.*
XII. *Damage to the Ship, where the Lading contributes, and the ſtandard Rate in Contributions.*
XIII. *The Maſter becomes a Captive for the Redemption of Ship and Lading, where liable to the* Averidge, *and where diſcharged.*
XIV. *What Goods are ſubject to the* Averidge.
XV. *Contribution for* Pilotage, *and where the remaining Goods not ſubject to* Averidge.
XVI. *Rules general for ſetting the* Averidge.
XVII. *Three Sorts of Goods taken at Sea.*

I. SHIPS being freighted and at Sea, are often ſubject to Storms and other Accidents, in which, by the ancient Laws and Cuſtoms of the Sea, in *extreme Neceſſity*, the *Goods, Wares, Guns, or whatſoever elſe* ſhall be thought *fit*, may in ſuch Extremity be flung over-board; but then the Maſter ought to conſult with his Mariners, who if they conſent not, and yet the Storm and Danger continues, the Maſter may command notwithſtanding, the caſting over-board what he ſhall judge moſt fitting for the common Safety of the reſt. So likewiſe Goods coming from infected Towns or Places may be caſt over-board; and if an Action be brought at *Com-*

Leg. Rhod. de jact.

Bracton, lib. 2 *fol.* 41. *b. n.* 3.

49. E. 3. fol. 15. *mon Law*, the Defendant may juſtify the ſame by pleading the ſpecial Matter.

Leg. Oleron, cap. 8. If there be a *ſuper-Cargo*, a Requeſt ought to be made to him to begin firſt; but if he refuſes, the Mariners may proceed.

Leg. Conſolat. del Mere. II. If the Ship ſo fortunes as to out-weather the Storm, and in Safety arrives at her Port of Diſcharge, the Maſter, and moſt of the Crew, muſt ſwear that the Goods were caſt over for no other Cauſe but purely for the *Safety of the Ship and Lading.* *Leg. Wisbicenſ. Artic 38, 39.* The Cuſtom of clearing of that Point, varies according to the ſeveral Countries or Places they arrive at.

Where Goods are laden above the Overlope, or forbidden Goods be tranſported; if ſuch Goods happen to be the Cauſe of any Danger or Damage, the Maſter ſhall bear the Loſs; alſo he may be proſecuted Criminally.

Leges Gulіel. 1. & H. 1. c. 98. de pactis ad legem Rhodiam. III. King *William the Conquerour*, and *Henry the Firſt*, made and ratified this Law concerning Goods caſt overboard by Mariners in a Storm, in Imitation of the Ancient *Rhodian Law, De jact.*

Selden ad Eadmerum & Notæ & Spicilegium, fol. 183 Weelock de Priſ. Anglorum legibus, fol. 167. Si ergo jecero res tuas de Navi ob metum mortis, de hoc non potes me implacitare, nam licet alteri damnum inferre ob metum mortis quando periculum evadere non poteſt. Et ſi de hoc me meſcres, qd' ob metum mortis nil feciſſe de comeſpriorari. Et ea que in navi reſtant, dividantur in communi ſecundum catalla, & ſi quis jecerit catalla extra navim quando neceſſitas non exegerit, ea reſtituat.

IV. The Ship arriving in ſafety, the remainder muſt come into the *Averidge*, not only thoſe Goods which pay Freight, but all thoſe that have obtained Safety and Preſervation by ſuch *Ejection*, even Money, Jewels and Clothes, and ſuch like, are not exempted. *Leg. 1. & 2. ad leg. Rhod. & leg. Oleron.*

But thoſe things which are born upon a Man's Body, Victuals, and the like, put on Ship-board to be ſpent, are totally excluded from the Contribution.

The Maſter ought to be careful, that only thoſe things of the *leaſt Value* and *greateſt Weight* be flung overboard. *Leg Wisbicenſ. Artic. 20, 21.*

In

In the rating of Goods by way of Contribution, this Order is obſerved. If they chance to be caſt before half the Voyage be performed, then they are to be eſteemed at the Price they coſt; if after, then at the Price as the reſt, or the like ſhall be ſold at the Place of Diſcharge.

The Perſon (whoſe Goods have been caſt) is to be careful to have the ſame eſtimated before the Ship do diſcharge, wherein the Maſter ought to be Aſſiſtant.

Averidge, in the Merchant's Law, is uſed or taken for a certain Contribution that Merchants and others do proportionably make towards their Loſſes who have their Goods caſt into the Sea for the Safeguard of the Ship, or of the Goods and Lives of them in the Ship, in the time of Tempeſt; and this Contribution ſeems to be ſo called, becauſe it is proportioned after the Rate of every Man's Averidge or Goods carried. It is derived from the Word *Averia*, *Cattle*. *Vide Cow. Interp. verb. Average.*

Goods are ſhip'd in *England*, and a Tempeſt ariſeth, the Paſſengers, for ſaving their Lives, caſt them overboard, and another Engliſh Ship takes them, the Owners bring *Trover*, it lies, becauſe delivered upon the Land, *Caps verſus Tooker*, 2 *Roll*'s Reports, 498.

It is lawful for Paſſengers to caſt Goods over-board out of a Ferry-boat, in Caſe of a Tempeſt, for Preſervation of their Lives: So if the Ferryman ſurcharge the Boat with Goods, the Owners of the Goods ſhall have their Remedy againſt the Ferryman in this Caſe of a Surcharge, but not in the other Caſe, 12 Report 63. 2 *Bulſt*. 280.

V. As this Law doth take care that this common Calamity ſhould be born by all the Parties intereſſed by a general Contribution, ſo the *Common Law* takes notice of the Misfortune, and makes Proviſion to indemnify the Maſter; and therefore if the Party-owner of ſuch *ejected* Goods, ſhall bring an Action againſt the Maſter or Owners of the Veſſel, the Defendant may plead the ſpecial Matter, and the ſame ſhall bar the Plaintiff. 12 *Jac. in B.R. Bulſtrod* 2 *part, fol.* 280. *Bird verſus Aſtcot.* 12 Report 63.

VI. But if the Ship's Gear or Apparel be loſt by Storm, the ſame is not within the *Averidge*, but is accounted like unto a Workman breaking or ſpoiling his Tools, except in the avoiding of a Danger, as the flinging the *Maſt* over-board, or the ſlipping the *Tow-Anchor* or *Boat*. *Leg.* 1. *ff. de exercit. action.*

L. amiſſa & Oleron. Goods brought ſecretly in the Ship againſt the Maſter or Purſer's Knowledge, if ejected, no Contribution is to be had.

Johannes Locinius l. 2. c. 7. de jactu, & 8. de contributione. This Order is obſerved generally in the rating the remainder of the Goods by way of Contribution.

If they chance to be caſt over-board before half the Voyage performed, then they are to be eſteemed at the Price they coſt; if after, then at the Price as the reſt, or the like ſhall be ſold at the Place of diſcharge.

Leg. 1. del. Mer. exempt. & leg. Si non ſortem de cond. in de. VII. As the *Common Law* looks upon the Goods and Cargo as a Pawn or Pledge for the Freight, ſo the *Marine Law* looks upon them likewiſe as a Security for the anſwering the *Averidge* and *Contribution*, and that the Maſter ought not to deliver the Goods till the Contribution is ſettled, the ſame being tacitly obliged for the one as well as the other. *Ad Leg. Rhod. l. 2. Si non conſervatis.*

Leg. Navis 4. ad Leg. Rhod. And *Vinius's* Commentary *fol. 235.* VIII. If through the rifling of the Ship, or the caſting or unlightning the Ship, any of the remaining Goods are ſpoiled, either with wet or otherwiſe, the ſame muſt come into the Contribution for ſo much as they are made worſe.

Leg. 9. §. 3. ad exhib. IX. If it falls out that a Ship entring into a Port or Channel, cannot make way, and there be a lightning or diſburdening of the Ship, then the Contribution falls two Parts to the Lading, and one third to the Ship, except the Ship ſurpaſs in value the Lading, or that there is ſome bad Quality in the Ship it ſelf.

L. 1. verſ. quod convenit depoſ. But to prevent that ambiguous Queſtion, if the Party covenants that the Goods ſhall be delivered at the Port covenanted and appointed, then Condition makes Law.

So for the *Pilot's* Fee and riſing of the Ship off Ground, when there is no Fault in the Maſter.

Leg. quem admodum parag. Si navis ad leg. Aquilia. X. If two Ships happen to encounter and croſs each other, and the Crew ſwear their Innocency, Contribution muſt be made by a juſt Equality; but if one periſhes, as there can be no Proportion of the Loſs, ſo no Contribution. The reaſon that is given, for that otherwiſe a Skipper might on purpoſe ſet an old weak Ship againſt a ſtrong Ship, and by that Means hedge himſelf into a Contribution and Recompence. However, this bars not the Owners from bringing their Action againſt the negligent Maſter, by which Means he may recoop himſelf in Damage, if it

Eod. leg. 18 H. 6. num. 52. 3 Inſt fol. 146.

happens at Sea, the Action by the *Civil Law* is called *Legis Aquilæ.* *Goodwin verſ. Tompkins, Noy Rep.* 148.

If ſuch a Misfortune happens in the Night at Sea, the Party, if he will compleatly arm himſelf for his recovery, ought to prove, that he made out Light or Fire, or otherways gave notice by crying or calling out.

XI. If it falls out in the Ship or Veſſel, by the indiſcreet Stowing or Lading thereof above the Birth-mark, that ſuch *Ejection* happened, in that Caſe it has been uſed by the Marine Laws no Contribution to be made, but Satisfaction is to be anſwered by the Ship, Maſter, or Owners. *Laſt Servus.* §. 27. *& Si* 23. *ad leg. Aquil.*

If Salt or Corn be laid looſe, or in an heap by divers Perſons in one Ship, without Diſtinction, and the Maſter delivers to any of them their due Share or Quantity; but before the reſt receive their Share or Meaſure, the remaining Salt or Corn waſhes or loſes, thoſe that had the good Fortune to have their Shares, ſhall enjoy it without any Contribution to the other Partners. *Lex Mercat.* 110.

XII. If to avoid the Danger of a Storm, the Maſter cuts down the Maſts and Sails, and they falling into the Sea, are loſt, this Damage is to be made good by Ship and Lading *pro rata:* Otherwiſe if the Caſe happens by Storm or other Caſualties. *Ad leg. Rhod. leg.* 2. §. *Si Conſervatis.*

No Contribution is to be paid in Caſe one Ship ſtrike againſt another whereby Damage happens, but full Satisfaction is to be anſwered the Merchant in Caſe of Fault or Miſcarriage in either; or an equal Diviſion of the Damage, in Caſe it happen by a *Caſuality*, as above.

If a *Lighter* or *Skiff*, or the Ship's Boat into which part of the Cargo is unladen for the lightning of the Ship, periſh, and the Ship be preſerved, in that Caſe Contribution is to be made; but if the Ship be caſt away, and the Lighter, Boat, or Skiff be preſerved, there no Contribution or Averidge is to be had, it being a Rule, *No Contribution but where the Ship arrives in Safety.* *F. de leg. Rhod. leg. navis onuſt. leg. navis ad leg. Rhod. de jactu* Sir *Francis Moore, fol.* 297.

XIII. If a Ship happens to be taken, and the Maſter, to redeem the Ship and Lading out of the Enemies or Pirates Hands, promiſes them a certain Sum of Money, for Performance whereof himſelf becomes a Pledge or Captive in the Cuſtody of the Captor; in this Caſe he is to be redeemed at the Coſts and Charges of the Ship and *Leg. Rhod. de jactur. l* 2. *Si navis à Piratis.*

Lading, and Money, if there be any in her, are contributary according to each Man's Intereſt for his Ranſom.

Moore, fol. 297 pl'. 443. Hicks verſus Pallington.

So where a Pirate takes part of the Goods to ſpare the reſt, Contribution muſt be paid.

But if a Pirate takes by Violence part of the Goods, the reſt are not ſubject to Averidge, unleſs the Merchant hath made an expreſs Agreement to pay it after the Ship is robb'd.

Grot. de introd jur. Holl. par. 29 Sueton. jur. Naut. in the end of the thirteenth Chapter.

But if part of the Goods are taken by an Enemy, or by Letters of Marque and Reprizal, *è contra.*

So likewiſe in Storm, if the ſame is done for Preſervation of the Remainder.

XIV. In Ejectment the Maſter or Purſer of the Ship ſhall contribute for the Preſervation of the Ship, and alſo the Paſſengers for ſuch Wares as they have in the Ship, be it Pearls, precious Stones, and ſuch like; and Paſſengers that have no Wares or Goods in the Ship, yet in regard they are a burden to the Ship, Eſtimate is to be made of his and their Apparel, Rings, and Jewels, towards a Contribution of the Loſs; and generally all things in the Ship, except the Victualling and Proviſions of the Ship, and the Bodies of Men (unleſs Servants) muſt bear a proportionable Share in the Contribution.

Peckeus ad leg. Rhod de jact. fol. 196, 197, 198.

The Eſtimate being made of the Goods loſt and ſaved, the Price is to be ſet down, not for how much they were bought, but how much they might be ſold for at the time when the Ejectment was made; and if any thing be flung into the Sea, and endamaged, and afterwards is recovered again, yet Contribution is to be made only for the Damage.

XV. Contribution is to be paid for the Pilot's Fee that hath brought a Ship into a Port or Haven for her Safeguard, (it being not the Place ſhe was deſigned for) ſo to raiſe her off the Ground when there is no Fault in the Maſter.

Grotius Introd jur. Holl. 329. *Vinius* and *Peckeus* Commentaries on the Laws of *Rhodes, fol.* 236.

If a Maſter of a Ship lets out his Ship to Freight, and then receives his Complement, and afterwards takes in Goods without leave of the Freighters, and a Storm ariſes at Sea, and part of the Freighters Goods are caſt overboard, the remaining Goods are not ſubject to the Averidge, but the Maſter muſt make good the Loſs out of his own Purſe.

The

The Goods which are loſt are to be valued, and the Goods ſaved are to be eſtimated, which being known, a proportionable Value is to be contributed by the Goods ſaved, towards Reparation of the Goods *ejected*, or caſt over-board.

In which, regard is always had, not to what might be got by the Goods loſt, but what the intrinſick Damage is by the loſs of the ſame; the which are not to be eſtimated what they might have been ſold for, as what they coſt, or were bought for. *Locinus, lib.* 2. *cap.* 8, 9, 10, 11.

XVI. But now the Cuſtom is general, the Goods ſaved and loſt are eſtimated according as the Goods ſaved were ſold for, Freight, and other neceſſary Charges, being firſt deducted. The Cuſtom of Places varies this *Modus* of eſtimating, the which is done by Merchants and Mariners indifferently nominated by the Court.

If there were Plate, Jewels, or the like, in a Trunk, Cheſt, Pack or Bale, at the time of their Ejection, if there be a *ſuper Cargo*, he ought to give notice, by diſcovering of the ſame to the Maſter or Mariners, otherwiſe he ſhall be anſwered in the Contribution no more than the bare extrinſick Value appeard to be; but the Aſſurers will hardly fare ſo well. *Ad Leg. Rhod.* §. *ult. Inſtit. de rer. diviſ. &* *leg.* 9. §. *ult. de acq rer. Dom.*

If Contribution ſhall be ſetled, and the Merchant will not agree, the Maſter may detain the Lading, for the ſame is as tacitly obliged to anſwer that as the Freight; and if at the *Common Law* the Merchant ſhould bring an Action, the Defendant ſhall bar him by pleading the ſpecial Matter.

If Goods are caſt over-board, and afterwards are recovered, Contribution ceaſes, ſaving for ſo much as they are damnified and made worſe by reaſon of ſuch Ejectment. *ff. ibid. leg. Navis*, §. *cum autem.*

Note, Goods caſt over-board to lighten the Ship, make no *Derelict*. 5 *Co.* 107. *b.* *Leg.* 25. *D. de prob leg. falſus* §. *Si jactum D. de furt.*

And though ſuch Neceſſity ſeems to ſubject the Lading to Ejectment, to prevent the Ruin and Deſtruction of the Perſons, yet ſome Lading ſeems excepted, and therefore Cannon, and other Inſtruments or Proviſions *conſigned to relieve a City*, ought not to be flung over-board; for in ſuch Caſe the Law imposeth on every Subject, that he prefer the urgent Service of his Prince, before the Safety of his Life. *Bacon Max. fol.* 17. *privilegium non valet contra rempublicam.*

XVII. Goods taken upon the Sea, are of three Sorts. 1. Goods taken by Letters of Mart, by *jus Repriſaliarum*. 2. Taken from Pyrates or Sea Rovers; And 3. From profeſſed Enemies. Thoſe Goods that are taken from Pirates, are eſteemed to be the juſt Prize or Prey to any taker of them, ſo that an Account be given of them to the Admiral. If a Ship or Goods be taken from a profeſſed Enemy, it is to be proceeded in according to the Authority whereby it was taken. But if Goods be taken by a profeſſed Enemy, and afterwards they are taken from him, and the ſame Owner claims them, they ought to be reſtored to him, for the Law looks upon theſe Goods as received, not taken, yet with ſome Recompence for them. But when ſuch Goods became lawful Prize to the Taker, then the Admiral is to have his 10th Part, and the Remainder to be proportionably divided between the Takers. *Lex Mercat.* 113, 114.

CHAP.

Chap. VII.

Of Pollicies of Aſſurance.

I. *Aſſurances, by whom firſt introduced*
II. *Aſſurances, the Nature of them.*
III. *How eſteemed of by Law.*
IV. *The various ways of enſuring, and on what.*
V. *Aſſurance when eſteemed moſt dangerous, and of fraudulent* Poſicies.
VI. *Of the Receipt of* Premio, *and the cuſtom of Abatement on loſſes.*
VII. Policies *that now enſure againſt all the accidents of Heaven and Earth.*
VIII. *A Ship enſured generally, whether the ſame includes the Cargo, and whether it is neceſſary in the* Policy *to mention the paticular Goods.*
IX. *If the Maſter is diſcharged of the damage, whether the Inſurer may be made liable.*
X. *A Ship enſured from a Port; and ſhe is burnt before her departure, whether the Aſſurers are made liable.*
XI. *Goods enſured in one Ship, are afterwards in the Voyage put into another, the ſecond miſcarries, whether the Aſſurers are made liable.*
XII. *A Man enſures more than the value of the Cargo, the Cuſtom in ſuch caſe when uſurious.*
XIII. *A Ship is inſured from one Port to another, and there to be landed; the Cargo after arrival is ſold, and before landed is burnt, whether the Aſſurers ſhall be made anſwerable.*
XIV. *A Ship inſured from one Port to* (blank) *being in time of War taken, whether the Aſſurers ſhall anſwer.*
XV. *Of the Enſured's renouncing after a loſs; and what operation the ſame has by Cuſtom.*
XVI. *Of the Office erected by the Statute of* 43 Eliz. *what power; of the Juriſdictions claimed by thoſe at Common Law and the Admiralty.*
XVII. *What Power and Authority was given by the Statute of* 43 Eliz. *to that Court.*
XVIII. *What things it was deficient in, and holpen by the Statute of* 14 Car. 2. Cap. 23. *and of their Authority and Power general at this day.*
XIX. *Of the Advantages that ſeem to accrue to publick Aſſurances, different from private ones.*
XX. *The Office of Inſurance for Houſes burnt or demoliſhed by, or by reaſon of Fire: The Fund to anſwer the* Premium, *and the Rates for inſuring*

I. IT is conceived by *Suetonius*, that *Claudius Cæſar* was the firſt that brought in this Cuſtom of *Aſſurance*, by which the Danger and Adventure of the Voyages is divided, repaired and born by many Perſons, who for a certain Sum, by the *Spaniards* called *Premio*, aſſure Ships or Goods, or both, or a Proportion, according as the Policy is *.

In vita Claud. Cæſar, lib. 25. *cap.* 18.

* *Leg.* 1. *ff. qui Satiſd. cog. Grotius de Jure Belli ac Pacis lib.* 2. *cap.* 12. §. 3. *in fin.*

II. *Aſſurances*

Lex Mercat. cap. 13. p. 105. II. *Aſſurances* are either *Publick* or *Private*. *Publick* when they are made and entred in a certain Office or Court, commonly called the *Office of Aſſurance* on the *Royal Exchange* in *London*; and the ſame are called *Publick*, for that it is free for any Man to reſort and ſee what another hath aſſured upon his Adventure.

Private is, when an *Aſſurance* is made, but the Enſured keeps the ſame ſecret, not deeming it fit that any ſhould ſee or know their *Cargo* or Adventure, or what *Premio* they have given, or Aſſurance they have made; and the ſame being never entred in the Office, is known by the name of a *Private Aſſurance*.

Form of an Aſſurance of Goods, outward bound. Laws of the Sea. 585. Appendix to the ſame. 5.

Another Form of Ships only. Appendix to the Laws of the Sea. 3.

Another on Ship and Goods, *ibid.* Appendix 6.

III. By the *Common Law* they are both of the ſame validity, as in reference to obtain Satisfaction from the Enſurers, if loſs or damage ſhould happen to the Adventure.

43 Eliz. c. 12. But by the Proceedings erected by *Statute* of 43 *Eliz.* *cap.* 12. only thoſe that are entred in the Office of that Court, can be ſued or determined there.

Indebitat Aſſumpſit pro præmio, upon a Policy of Aſſurance upon ſuch a Ship, the Defendant demurred ſpecially becauſe he did not ſhew the Conſideration certainly what the *Præmium* was, or how it became due, *ſed non allocat*, for it is as good as *Indebitat pro quodam Salario*, which hath been adjudged good. *Fowlk cont. Pinſacke* 2 *Levinz.* 153.

If the Perſon whoſe Name is uſed in the Aſſurance, be in Time of War taken to be no Friend to the State, there is danger to pay the Aſſurance. If after the Subſcription of the Aſſurer, the Goods ſhould be arreſted and made forfeited, to anſwer the ſame to the Prince, as it often happens.

If Goods are ſtoln or embezeled on Shipboard, the Maſter, not the Aſſurer is reſponſible. So if the Goods be loſt in default of the Pilot. *Lex Mercat.* 108, 109.

Policy

Policy of Aſſurance to warrant a Ship for 12 Months, the Ship did not periſh within the time of 12 Months, being accounted according to the Months of *January*, *February*, &c. but within 12 Months reckoning 28 Days to the Month reſolved that the Policy was not forfeited cited in Sir *Woollaſton Dixes*'s Caſe 1 *Leond*. 96.

Aſſurance for 12 Months, how to be conſtrued.

IV. *Aſſurances* are of various ſorts, ſome being to places certain, others general: Thoſe that are made to places certain, are commonly upon Goods laden or to be laden aboard outward, and until the ſame Adventure ſhall be laid aſhore at ſuch a Port.

Leg. 4, 5. *D. de Naut. fan.*

Or upon Goods laden or to be laden homeward in ſuch a Ship till the Adventure ſhall likewiſe be landed.

Or elſe upon Goods out and in, with liberty to touch at all Ports as are mentioned in the Policy.

Johannes Locinius, *l.* 2. *c.* 5. §. 5, 6.

So likewiſe on Ships that go Trading-Voyages, as round to *Cales*; and that it ſhall be lawful after the Ships delivery there, to take in at the ſame Port another Cargo, and with that proceed to the *Weſt-Indies* or other parts and back again to *Cales*, and from thence to *London*; this Policy being general and dangerous, procures ſeldom ſubſcriptions, or at leaſt very chargeable ones.

As Goods and Merchandize are commonly Enſur'd, ſo likewiſe are the Ships Tackle and Furniture; but in reguard there ſeldom happens a Voyage but ſomewhat is miſſing or loſt, the *Premio* commonly runs higher than for Merchandize.

Santer. p. 3. *num.* 13. *ſeq.* 43, *ſeqq.*

Aſſurances may be made on Goods ſent by Land, ſo likewiſe on Hoyes, and the like, and may be made on the heads of Men; as if a Man is going for the *Streights*, and perhaps is in ſome fear that he may be taken by the *Moors* or *Turkiſh* Pirates, and ſo made a Slave, for the Redemption of whom a ranſom muſt be paid, he may advance a *Premio* accordingly upon a Policy of Aſſurance; and if there be a Caption, the Aſſurer muſt anſwer the Ranſom that is ſecured to be paid on the Policy.

Liſle ver. Sedgwick, Mich. 29 *Car.* 2. *in* R. R.

V. Thoſe Aſſurances are moſt dangerous when there are theſe words inſerted, *loſt or not loſt*; which is commonly done when a Ship hath been long miſſing, and no Tidings can be had, the *Premio* (eſpecially in time of War) will run very high, ſometimes 30 or 40 *per Cent.* and though it

If ſuch Enſurance be made in the Office, they then ſet down the Hour when intimation is

given of the loſs.

it happens at the time that the ſubſcription is made, the Ship is caſt away, yet the Aſſurers muſt anſwer.

Locinius, lib. 2. *cap.* 5. § 9, 10.

But if the Party that cauſed the Aſſurance to be made, ſaw the Ship wreckt, or had certain Intelligence, ſuch ſubſcription will not oblige, the ſame being accounted a meer fraud.

Arthur Stockden of *Stockden's* Caſe, *Mich.* 26 *Car.* 2. *in B. R.* Afterwards convicted by Information for the fraud, *Term. Sancti Hilarii ſequen. in B. R. Vide Liv. lib.* 25.

So likewiſe if the Aſſured, having a rotten Veſſel, ſhall aſſure upon the ſame more than ſhe is worth, and afterwards give order that going out of the Port, ſhe ſhould be ſunk or wreckt, this will be fraudulent, and not oblige the Aſſurers to anſwer.

In the Year 1678. one *Nownham Perkins* and *Stoakes* were Owners of a Veſſel called the *May-Flower* Ketch, the Veſſel coming laden with Wines on the account of one *Fierbraſſe* and *Stone* to the *Iſle of Wight*, *Perkins* being then in the ſame Place, contrives with one *Ivy* the Maſter to ſell the Freighters Goods privately, and that being effected to go out to Sea ſome ſmall diſtance from the Iſle, and there privately ſink the Veſſel, and pretend ſhe ſtruck, and then foundred by the extremity of Weather. The Plot being laid, *Perkins* haſtens up to *London*, and makes a Policy of Aſſurance on the Veſſel; which being done, remits his Orders to *Ivy* to put in Execution the contrivance, and accordingly the Goods, or the beſt of them, being diſpoſed of, ſtands out to Sea, and then with his own Hands, by the force of an Iron Crow, makes a hole in the Hold, and then in his long Boat (the Crew perceiving the Veſſel to be ſinking) conveys himſelf and Mariners aſhore; *Ivy* remits up advice of the loſs, and *Perkins* (as if he had never known any thing of the matter) demands the Monies aſſured with great Confidence, and thereupon brings an Action for the ſame; but before the Cauſe came to a Tryal, *Fierbraſſe* and *Stone* bring a Trover againſt *Perkins*, and thereupon the whole Practice came out, and a Verdict was had againſt the Defendant, with this further, That if *Perkins* would proceed on his Actions on the Aſſurance, he muſt expect that this practice and fraud of his, would totally Poiſon his Aſſurance, and thereupon being well adviſed, never proceeded.

Hill 3. 32 *Car.* 2. *B. R.*

The Subſcription mentions as if the *Premio* had been

VI. Few or Scarce any enſure the whole Ship, but the Subſcriptions being for Sums certain, as 50 *l.* or 500 *l.* at the *Premio* then current, which when the Adventure is born

born they receive; but if a loſs happens, the *Premio* is deducted together with the uſual Abatement: So that the Enſured receive much about 80 *per Cent.* if a loſs happens.

actually received, but it is ſeldom done till the Adventure is born.

If an Aſſurer pays his Money, believing the Ship to be loſt when it is not, he may bring an *Aſſumpſit* for the Money. Cited to be adjudged, *Salk.* 22. *pl.* 2.

VII. The *Policies* now adays are ſo large, that almoſt all thoſe curious Queſtions that former Ages, and the Civilians according to the Law Marine, nay and the common Lawyers too, have controverted, are now out of debate; ſcarce any misfortune that can happen, or proviſion to be made, but the ſame is taken care for in the Polices that are now uſed; for they enſure againſt Heaven and Earth, ſtreſs of Weather, Storms, Enemies, Pirates, Rovers, &c. or whatſoever detriment ſhall happen * or come to the thing enſured, &c. is provided for.

Ut quæ in naves impoſuiſſent, ab hoſtium tempeſtatiſque vi publico periculo eſſent. Negotiatoribus certa lucra propoſuit ſuſcepto in ſe damno, ſi cui quid per tempeſtates accidiſſet. Livius, *lib.* 23. *cap.* 25. *Vide* Zeſius *in Commentario ad digeſta tit. pro Socio, num.* 25. * *Sub nomine periculi, de quo ſit cautio comprehenditur omnis caſus qui accidit in mari, à tempeſtate, ab hoſtibus, prædonibus, repiſaliis, ut vocant arreſtis aliiſque modis uſitatis & inuſitatis citra fraudem & culpam contrahentium, aut domini mercium vel navis.* Grotius *de Jure Holl. part.* 24.

VIII. If a Merchant enſures ſuch a Ship generally, and in the Policy it is expreſſed of ſuch a Burthen, the Ship happens then to be laden and after miſcarries, the Enſurer ſhall not anſwer for the Goods, but only for the Ship.

Locinius, lib. 2. *cap.* 5. §. 7. 9, 10.

IX. It matters not in the Policy whether the particular Wares and Goods are Named, but generally upon the Principal Wares, and all other Commodities laden or to be laden for the Enſured, or for his account, or for any other.

X. If a Ship be Enſured *from the Port of London* to *Cales*, and before the Ship breaks Ground, takes Fire, and is Burnt, the Aſſurers in ſuch a caſe ſhall not anſwer, for the Adventure begun not till the Ship was gone from the Port of *London*; but if the Words had been, *at and from the Port of London*, there they would upon ſuch a misfortune have been made liable.

If ſuch an Aſſurance had been from *London* to *Cales*, and the Ship had broke Ground, and afterwards been driven

Note, The Port of *Lon-*

by

tion extends from the *North Foreland* in the Iſle of *Thanet*, over in a Line to the *Naſe* in *Eſſex*, and from thence to *London*-Bridge, *Rot. Scaccar.* 15 *Car.* 2. 7 *H.* 6. 14. *in Quare impedit*, 5 *R.* 2. Tryal 54. 34 *H.* 8. *tit.* 107. *Mich.* 30. 31 *Eliz.*

by Storm to the Port of *London*, and there had took Fire, the Enſurers muſt have anſwered; for the very breaking of Ground from the Port of *London* was an Inception of the Voyage.

On the other hand, if a Man at *Cales* enſures a Ship from thence to *London*, if a loſs happens, the Aſſurer, if he comes into *England*, ſhall anſwer by the *Common Law*; for though the place where the Subſcription was made, and the *Premio* given was in a Foreign Country, yet that is not material, for the Action that is brought is grounded on the Promiſe, which is tranſitory and not local, and ſo it was adjudged where the Defendant in conſideration of 10 *l.* had enſured, that if the Plaintiff's Ship and Goods did not come ſafe to *London*, he would pay 100 *l.* afterwards the Ship was robb'd on the Sea, and in an Action brought for the 100 *l.* the Plaintiff had Judgment, notwithſtanding the Robbery or Loſs was on the main Sea and the Subſcription out of the Realm.

Salk. 444. *Shaw. cha.* 106. cited in *Show.* 325.

If after a Policy of Aſſurance, a damage happens, and afterwards in the ſame Voyage a Deviation; yet the Inſured ſhall recover for what happen'd before the Deviation, for the Policy is diſcharged from the Time of the Deviation only.

* That has been much doubted, and Opinions of the Court have generally inclined againſt the Aſſurers *Leg. ult. ad Rhod. Digeſt. Paulus. lib.* 14. *tit.* 2. §. 10.

XI. If Goods are Enſured in ſuch a Ship, and afterwards in the Voyage it happens ſhe becomes leaky and crazy, and the *ſuper Cargo* and Maſter by conſent become Freighters of another Veſſel for the ſafe delivery of the Goods; and then after her relading, the ſecond Veſſel miſcarries *, the Aſſurers are diſcharged: But if there be theſe words, *The Goods laden to be tranſported and delivered at ſuch a place by the ſaid Ship, or by any other Ship or Veſſel, until they be ſafely landed*, then the Enſurers muſt anſwer the misfortune.

Vide Grot. Introd. Jur. Holl. 212. 23. And indeed is more the Cuſtom of Merchants than Law.

XII. If a Man Enſures 5000 *l.* worth of Goods, and he hath but 2000 *l.* remitted, now he having enſured a real Adventure, by the Law Marine all the Aſſurers muſt anſwer *pro rata*, if a loſs. But by the Opinion of ſome, only thoſe firſt Subſcribers who under-writ ſo much as the real Adventure amounted to, are to be made liable, and the reſt remitting their *Premio* 10 *s. per Cent.* deducted out of the ſame for their Subſcriptions, are to be diſcharged.

Debt

Debt upon Obligation with Condition, to pay ſo much Money, if a Ship returned within ſix Months from *Oſtend* in *Flanders* to *London* (which was more by a Third part than the Legal Intereſt of the Money) and if ſhe do not return then the Obligation to be void, the Defendant pleaded that there was a corrupt Agreement between him and the Plaintiff, and that at the time of making of the Obligation that he ſhould have no more for Intereſt, than the Law permits, in caſe the Ship ſhould ever return, and avers that the Bond was entred into by *covin* to avoid the Statute of Uſury. *Per Hales* clearly this Bond is not within the Statute, for this is the common Way of Aſſurance, and if this were void by the Statute of Uſury, Trade would be deſtroyed, for it is a caſualty whether ever ſuch Ship ſhall return or not, but he agreed the Averment was well taken, becauſe it diſcloſed the manner of the Agreement. *Hardres* 418. *Joy* againſt *Kent*.

Action upon the caſe, upon a Policy of Aſſurance of Goods from *London* to *Naples*; the Adventure was to begin in time of the Lading at *London* (dangers of the Sea only excepted) with this Clauſe, *warranted to depart with Convoy*, the Ship departed with Convoy, but was ſeparated from the Convoy, by ſtreſs of Weather, and put into *Torbay*, and was there detained by contrary Winds, afterwards the Maſter of the Ship expecting to meet the Convoy, departed out of the Harbour, but could not meet the Convoy, being hindred by ſtreſs of Weather, the Ship was taken by the *French*. Judgment *pro Quer' Jefferies* againſt *Lagendra*. To depart with Convoy. *Show.* 320. 4 *Mod.* 58. 3 *Lev.* 320. *Salk.* 443.

Caſe upon a Policy, which was to inſure the *William Galley*, in a Voyage from *Bremen* to the Port of *London*, *warrented to depart with Convoy*: The caſe was, the Galley ſet ſail from *Bremen* under Convoy of a *Dutch* Man of War to the *Elb*, where they were joined with two other *Dutch* Men of War and ſeveral *Dutch* and *Engliſh* Merchant Ships, whence they ſailed to the *Texel*, where they found a Squadron of *Engliſh* Men of War and an Admiral; after a ſtay of 9 Weeks, they ſet out from the *Texel*, and the Galley was ſeparated in a Storm, and taken by a *French* Privateer, taken again by a *Dutch* Privateer, and paid 80 *l.* Salvage. And it was ruled by *Holt* C. J. That the Voyage ought to be according to Uſage, and that their going *Salk.* 445.

going to the *Elb*, tho' in Fact out of the Way, was no Deviation; for till after the Year 1703. there was no Convoy for Ships directly from *Bremen* to *London*: And the Plaintiff had a Verdict. *Bond* v. *Gonſalse*, *February*. 14 1704. *coram Holt* C. *J.* at *Niſi Prius* at *Guildhall.*

Locin. l. 2. c. 5. §. 9. And by the Laws of *Antwerp* there is a time allotted after the Ships arrival at her port how long the Adventure is to be born by the Enſurers, which is about 15 days *Art.* 13. *Aſſecur Antwerp.*

XIII. A Merchant Enſures his Goods from *London* to *Sally*, and there to be landed; the Factor after arrival, having Opportunity, ſells the Cargo aboard the ſame Ship without ever unlading her, and the Buyer agrees for the Freight of thoſe Goods for the Port of *Venice*; before ſhe breaks Ground the Ship takes Fire, the Aſſured and Buyer are abſolutely without remedy; for the Property of the Goods becoming changed, and Freight being contracted *de novo*, the ſame was as much as if the Goods had been Landed.

And ſo it is if the Factor after her arrival had contracted for Freight to another Port, and the Ship had happened to take Fire, the Aſſurers are hereby abſolutely diſcharged for ever.

Caſe of Monſieur *Gourdan* Governour of *Cales*, *Anno* 1585.

XIV. If a Ship be Enſured from *London* to   and blank being left by the Lader to prevent her ſurprize by the Enemy, in her Voyage ſhe happens to be caſt away, though there be private Inſtructions for her Port, yet the Enſured ſit down by the loſs, by reaſon of the uncertainty. So a Blank is left in the Policy for the value of the Ship or Lading, if a loſs, and there be not words that may ſupply, the Enſured may endanger the Policy.

A taking of a Ship (that is inſured) by Pirates is to be underſtood, the Perils of the Sea. *Pickering* againſt *Barkley Stiles* 132. 2 *Rolls Abr.* 248.

Where Goods are redeemed from a Pirate, contribution muſt be paid by all, becauſe the Redemption is made for the ſafety of all, but if the Pirate be once Maſter of all, and yet take but ſome ſpecial Goods, whether from Ship or Merchant, and not as a Contentation for ſparing of the reſt, in this caſe, becauſe the Remainder is not aſſured thereby, but freely ſpared, no Contribution is to be made for the taken Goods to charge any Aſſurer with any part thereof. So Contribution ſhall be made for Goods ſpoiled by Wet, or other accident. Again if it be needful to lighten a Ship for her eaſier entry into Harbour or Channel, two parts of the Loſs fall upon the Goods,

Goods, and the third upon the Ship, unleſs the Ship is more worth than the Lading, and the charge of the Goods be not the Cauſe of her inability to enter, but ſome bad quality proceeding from the Ship its ſelf, or that otherwiſe it be provided in the Charter-party. *Lex Mercat.* 109.

XV. After notice of Loſs, the Enſured, (if he doth think fit) for that he hath Enſured the moſt of his Adventure, or that he would have the aſſiſtance of the Aſſurers; when there is hope of Recovery of the Adventure, he may then make a Renunciation of the Lading to the Aſſurers, then he comes in himſelf in the nature of an Enſurer, for ſo much as ſhall appear he hath born the Adventure of beyond the Value Enſured. *Locinius lib. 2. cap. 5. §. 8.*

But if the Merchant ſhall not renounce, yet there is a power given in the Policy for him to travel, purſue and endeavour a Recovery (if poſſible) of the Adventure after a misfortune to which the Aſſurers are to contribute, the ſame being but a trouble to give eaſe to the Aſſurers.

If prohibited Goods are laden aboard, and the Merchant enſures upon the general Policy, which always contains theſe words: *Of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettezons, Letters of Mart, and Countermart, Arreſts, Reſtrainments and Detainments of Kings and Princes, and all other Perſons, Barratry of the Maſter and Mariners, and of all other Perils, Loſſes, and Misfortunes whatſoever they be, and howſoever they ſhall happen or come, to the hurt and detriment of the Goods and Merchandize, or any part or parcel thereof;* whether if ſuch Goods be lawfully ſeized as prohibited Goods, the Enſurers ought to anſwer? It is conceived they ought not; and the difference hath been taken, where Goods are lawful at the time of Lading to be imported into that Country, for which they are conſigned for; but by matter *ex poſt facto* after the lading they become unlawful, and after arrival are ſeized, there the Aſſurers muſt Anſwer, by virtue of the Clauſe, *And all other Perils,* &c. But if the Goods were at the time of lading unlawful, and the Lader knew of the ſame, ſuch Aſſurance will not oblige the Aſſurers to anſwer the loſs; for the ſame is not ſuch an Aſſurance as the Law ſupports, but is a fraudulent one.

Sub nomine periculi, de quo ſit cautio, comprehenditur omnius caſus qui accidit in mari, à tempeſtate. ob beſtibus, prædonibus, repriſaliis, ut vocant, arreſtis, aliiſque modis uſitatis citra fraudem & culpam contrahentium aut domini

mercium vel navis. Grotius *de Introd. Jur Roll. par.* 24. *In hoc contractu bona fide verſandum eſt, ut natura ultro citroque obligationis poſtulat.* Locinius. *lib.* 2 *cap* 5. §. 8.

A Policy was made from *Cadiz* to *Vera Cruze* in *New Spain*, upon Monies lent upon Bottomry, and upon any kind of Goods and Merchandize whatſoever loaden aboard the Good Ship called the *Nouſtra Seignora del Carmen*, and *Mary Magdalen*, the Adventure beginning immediately from the lading before a day to come, and the Monies from the time they were to be lent, and ſo to continue from *Cadiz* to *Vera Cruze*, and after Delivery, with Proviſo to ſtay at any Port or Place in her Voyage, and likewiſe to touch at *Porto Rico*, and there to lade and unlade without any Prejudice to the Enſurance, the Cargo being valued at 1700 *l. ſterl.* without account, *&c.* againſt *Seas, Men of War, Fires, Enemies, Pirates, Rovers, Thieves, Jettezons, Letters of Mart and Countermart, Surprizals at Sea, Arreſts, Reſtraints and Detainments of all Kings, Princes, and People, of what Nation, Condition or Quality ſoever.* The Ship being laden at *Cadiz*, did depart towards *Vera Cruze*, and before arrival there, touching at *Porto Rico*, the Goods were there ſeized and arreſted, in an Action brought upon the Policy; the Defendant came in and pleaded, That the Ship at her arrival in her Voyage at the Port of *Rico*, was laden with Goods and Merchandize prohibited, and the ſame, and alſo the Ship, did there become forfeited by Default of the Proprietors, and was there ſeized and taken. The Queſtion was, if the Owners ſhould enſure, and then order prohibited Goods to be laden, whether that an Arreſt upon the ſame ſhould Entitle them to a Recovery? The ſecond Objection was, If (as the Defendant had pleaded this Plea) the ſame were good? As to the firſt, the Court did all incline, that the Enſurance ought to be *bona fide, i. e.* the Reſtraint ought to be of ſuch Goods as by Law were not reſtrainable; but ſurely that cannot be, for the Intention of Policies are to warrant the Perils of all manner of Goods in all manner of Caſes. So that if there be a loading *bona fide*, be it prohibited or not, the ſame in Caſe of Loſs ought to be anſwered, unleſs it were a fraudulent Contrivance: But to the ſecond, it was reſolved, That the Plea was inſufficient; for admitting the ſame ſhould not oblige the Enſurer, yet becauſe the Defendant did not ſhew that the Goods were laden either by the Enſured, or by their Factor or Order, otherwiſe the ſame ſhould not conclude them;

Iſaac Houbland verſus Edmund Harriſon. Hill. 31, 32 *Car.* 2. *in B. R Judg. in Paſch. ſeq.*

Like Judgment was given againſt *Lethulier adſ. Houbland, Trin.* 32 *Car.* 2. *in B. R. Rot.* 158.

them; for perhaps the Maſter or his Mariners, or a Stranger, might load them on Board without Order, ſo that upon the meer Inſufficiency of the Manner of Pleading, and not of the Matter, the Court gave Judgment for the Plaintiff.

But if a Merchant will Freight out Wool, Leather † and the like, or ſend out Goods in a Foreign Bottom *, and then make a Policy, the Ship happens afterwards to be taken, by Reaſon of which there becomes a Forfeiture of Ship and Lading, the Enſurers are not made ſubject to anſwer the Damage; for the very Foundation was Illegal and Fraudulent, and the Law ſupports only thoſe Aſſurances that are made *bona fide*; for if otherwiſe, and Men could be enſured againſt ſuch Actions, they would deſtroy Trade, which is directly to thwart the Inſtitution and true Intentions of all Policies.

† 12 *Car.* 2. *cap.* 32. 14 *Car.* 2. *cap.* 7, 18. * 12 *Car.* 2. *cap.* 18.

But if Goods ſhould happen to be lawfully Enſured, and afterwards the Veſſel becomes diſabled, by reaſon of which they relade by conſent of the *ſuper Cargo* or Merchant, into another Veſſel, and that Veſſel, after arrival, proves the Ship of an Enemy, by reaſon of which the Ship becomes ſubject to Seiſure; yet in this Caſe Enſurers ſhall anſwer, for that this is ſuch an Accident as is within the Intention of the Policy.

Several Men lade aboard Salt, withot diſtinction, not putting them in Sacks, and the like; the Ship arrives, the Maſter delivers to their Principals according to their Bills of Lading as they come one by one, it falls out that ſome of the Salt is waſh'd or loſt by reaſon of the Dampneſs of the Ship, and that the two laſt Men cannot receive their Proportion. There are in this Caſe theſe things to be conſidered:

Ritteriſh. ad leg. contract. 23. *de Reg. jur. cap.* 18. *pag.* 236, 237. *Stypman dicto Cro. num.* 335. *Inſt in pr. quib. mod. rer. contrah. ob re. l.* 2. *Si cert. peti.*

1. Whether the Maſter is bound to deliver the exact quantity?
2. Whether thoſe that have received this Loſs can charge the Aſſurers?
3. Whether the Aſſurers can bring in the firſt Men for a Contribution, they having their Salt delivered to them compleatly?

Certainly the Maſter is not bound to deliver the exact Quantity, nor is he obliged to re-deliver the very ſpecifical Salt, but only as Men are to repay Money or Corn by the diſtinction in a Bag or Sack, and out of them; but if the

Hill. 11 *Jac. in* C. B. *Laſtlow* and *Tomlinſon's* Caſe, *Hobart, fol.* 88. *Leg. quod. convenit de verb. ob.*

the Fault was in not pumping, keeping dry his Deck, and the like, there *è contra*: Though perhaps there may be ſpecial Agreement,

Beſides, this is a Peril of the Sea which the Maſter could not prevent, and of neceſſity he muſt deliver to one firſt before another.

As to the ſecond, It is no Queſtion but that the Aſſurers ſhall anſwer. But whether they ſhall bring in the firſt Men for Contribution, may be ſome doubt.

D. Leg. in mo-gere. It has been conceived by ſome, that they ought not; for they delivered their Salt to the Maſter *tanquam in Creditum*, and was not to expect the redelivery of the ſame ſpecifical Salt: Beſides, the Maſter muſt of neceſſity deliver to one Man before another.

But by others it has been conceived they ought to contribute *pro ratione*; for as Goods of neceſſity, ſome muſt be beſtowed in the Hold, and that ſuch Goods ſeldom eſcape the Peril of the Sea; ſo the reſt muſt of neceſſity contribute to that Misfortune, and ſo make no Diſtinction.

The Bills of Lading are very uſeful to ſettle the Difference between the Aſſurer and Aſſured, of which there are three Parts, one ſent over Sea, the other left with the Maſter, and the laſt remaining with the Lader.

XVI. The Office of Aſſurance was erected by the *Statute* of 43 *Eliz. cap.* 12. which reciting; ‘That whereas ‘Differences growing upon Policies of Aſſurances had ‘been ordered by diſcreet Merchants, approved by the ‘Lord Mayor, who did ſpeedily decide thoſe Cauſes, until that of late Years divers Perſons did withdraw themſelves from that arbitrary Courſe, and have ſought to ‘draw the Parties aſſured to ſeek their Monies of every ‘ſeveral Aſſurer by Suits commenced in her Majeſty's ‘Court to their great Charges and Delay: Whereupon it ‘was Enacted, That the *Chancellor* or *Keeper*, for the time ‘being, ſhould iſſue forth a ſtanding Commiſſion (to be ‘renewed Yearly, or as often as to him ſhall ſeem meet) ‘for the hearing and determining of all ſuch Cauſes ‘ariſing on Policies of Aſſurance, as ſhall be entred in ‘the Office of *Aſſurance* in *London*.

The Judges or Commiſſioners appointed, are the Judge of the Court of Admiralty, the Recorder of *London*, two Doctors

Doctors of the *Civil Law*, two Common Lawyers, eight grave and diſcreet Merchants, or to any five of them: and that they, or the greateſt part of the Commiſſioners have power to Hear, Examine, Order and Decree all ſuch Cauſes in a brief and ſummary way, without formality of Pleading.

They have Power to ſummon the Parties, examine Witneſſes upon Oath, commit to Priſon upon refuſal of Obedience to their Decrees; they are to meet once a Week at the *Aſſurance-Office*, or ſome other convenient publick Place, and no Fees at all are to be exacted by any Perſon whatſoever. §. 2.

There lies an Appeal from their Sentence to the Lord Chancellor or Lord Keeper (but the Party muſt depoſite the Monies decreed, and then, though the Party be impriſon'd, he may be diſcharged) and then it lies in the Lord *Chancellor*'s or *Keeper*'s Breaſt to affirm or reverſe, and to award the Party aſſured double Coſts. §. 3.

No Commiſſioner being Party Aſſurer, can act by virtue of this Commiſſion, nor until he hath taken his Corporal Oath before the Mayor and Court of Aldermen, to proceed uprightly and indifferently between Party and Party. §. 4.

XVII. This was a good act, had it been as carefully pen'd as was intended; for there were many things which this Act did not extend to.

Firſt, Any Man may at this Day make a private Policy notwithſtanding this Act, which is as good and effectual in Law to all intents and purpoſes, as one made and entred in the ſaid Office; and that ſuch a Policy might and may be now ſued at the *Common Law*.

Secondly, The Number of Commiſſioners being ſo great, that there could be no Court without five at the leaſt; and without a Court they neither could ſummon Parties, or examine Witneſſes, and that was very difficult to get.

Thirdly, If the Parties or Witneſſes refuſed to appear they had no power to puniſh the Party for the delay, with Coſts or otherwiſe, which was very miſchievous.

Fourthly, No Commiſſioner could ſit before he was ſworn: Commiſſions and the Commiſſioners being often renew'd, it was a trouble to be attending a Court of

Aldermen.

Aldermen, which was difficult ſome times of the Year to get.

Fifthly, Though they had power to commit the Party who refuſed to obey their Decree, yet they had no power to make any Order againſt the Ship.

14 Car. 2. cap. 23. §. 2. Which Matters being taken into conſideration, it was Enacted, That Three Commiſſioners, whereof a Doctor of the *Civil Law*, and a Barriſter of five Years ſtanding to be one, ſhould make a Court, and to act as any five before might have done.

§. 2. par. 2. They have likewiſe power now given them to ſummon Parties and Witneſſes, and upon contempt or delay in the Witneſſes upon the firſt Summons and tender of reaſonable Charges, or Coſts; and in the Parties upon the ſecond Summons, to puniſh the Offenders by Impriſonment.

§. 2. par. 3. Every Commiſſioner is now to take his Oath before the Lord-Mayor, to proceed uprightly in the execution of the §. 4. par. 2. ſaid Commiſſion; and any of them may adminiſter an Oath, ſo as the adverſe Party may have notice, to the end ſuch Perſon may be fairly examined.

§. 3. Commiſſions may iſſue out of the Court of Admiralty for examining of Witneſſes beyond Seas, or in remote Places by Directions of the Commiſſioners, and Decrees may be made againſt Body and Goods, and againſt Executors and Adminiſtrators, and Execution accordingly; and aſſeſs Coſts of Suits as to them ſhall ſeem juſt.

But Execution cannot be againſt Body and Goods for the ſame Debt, but the Party muſt make his Election as at the *Common Law*.

Oyles verſus Marſhal, Styles Rep. 418. 1654. XVIII. But theſe Statutes took not away that Cognizance which the Courts at *Weſtminſter* claim'd upon ſuch Contracts by the Common Law; but only gave this new erected Court a concurrent Juriſdiction with thoſe at the *Dowdale's* Caſe, *Coke lib.* 6. *fol.* 47. 36. *Eliz. in B. R.* Common Law: For though the Loſs happened out of the Realm, yet they had Juriſdiction of the Cauſe. And therefore if an Action be brought upon a Policy of Aſſurance, though the Loſs happen'd at Sea, yet the Jury ſhall enquire; for the Loſs is not the direct Ground of the Action, but the *Aſſumpſit*.

38 *H.* 8. *Crane* and *Beile. Coke* 4 *Inſtit. fol.* 138, 139. The Admiralty have likewiſe put in, if not for an abſolute Juriſdiction, yet at leaſt a concurrent one; yet both

both have been denied them, notwithſtanding that the Judge of the Admiralty is Judge of the Court of Aſſurance.

Suit depending, on a Decree in the Court of Policy of Inſurance, (which is but in the nature of a Court of Equity) or in a Court of Equity, is no Barr in an Action at Law, and therefore if the *Chancery* ſhould make a Decree upon a Covenant, upon which an Action lies at Common Law, the Party notwithſtanding this Decree may have his Action. *Came* againſt *Moy* 2 *Sid.* 121. Decree in the Court of Policy, no Barr to an Action at Law.

XIX. By the making of an Office-Policy, according to the Statute, *theſe Advantages will follow.*

1. If the Policy be loſt, if the ſame be entred with the Regiſter of the Office, the Entry is effectual to anſwer the Matter, both at the Common-Law, as well as in the ſame Court; but a private Policy loſt, is like a Deed burnt, unleſs that there be very ſtrong Evidence, as a Copy, and the like, it will be of little value. So that then there will remain nothing but an equitable Relief in *Chancery*, for the ſatisfaction of the Party.

2. If a Man Freights out a Ship from *London* to *Cales*, and aſſures here, he may write to his Correſpondent to make an Aſſurance there of the ſame; if the Matter comes before Commiſſioners, they may examine the Inſured upon Oath, and determine therein according to Law and the Cuſtom of Merchants: But at the *Common Law* the ſame cannot be, but Relief muſt be had in that Point according to Equity in *Chancery*.

3. The ſame is the Court of *Equity* as well as Court of *Law*; ſo likewiſe a Court to adjudge according to the Cuſtom of Merchants.

4. They may Decree againſt Twenty Aſſurers at one time, but at Law they muſt be ſued diſtinctly.

5. They may proceed out of Term as well as in Term, and (if the Matter will bear it) they may finiſh a Cauſe in a Fortnights time and leſs.

6. The Judgments there given are generally upon mature Deliberation, and by Perſons well skill'd in Marine Affairs; and if their Sentence is thought to be unreaſonable, the Lord Chancellor or Lord Keeper may, on Appeal determine the ſame.

7. The

The Bail, on a Writ of Error, can't render the principal; for they undertake that he ſhall pay the Money, or they will do it for him.
3 *Jac. c.* 8.
3 *Car.* 1. *c.* 4. §. 4.
Cro. Jac. 402.

7. The Parliament has had ſo ſpecial a regard to the Judgments given in this Court, that no Appeal from thence can lie till the whole Monies decreed are depoſited, and the full Coſts paid to the Appellee; which is more expeditious and advantageous than having of Bail at the *Common Law*; for in ſuch a Caſe, after the Plaintiff hath ſpent his Monies, and been delay'd three or four Terms, and with much Difficulty and Charge got Judgment, the Defendant or his Bail may render him to Priſon in diſcharge of themſelves. So that although this Court cannot compel the Defendant to put in Bail, yet the Sentence there being ſo ſwift from which there is no Appeal till the Monies are paid down, the ſame ſeems to be of great convenience to the Aſſurers as well as the Aſſured.

XX. There is another Office of Inſurance, but that is for Houſes burn'd or demoliſh'd; for the ſecuring the Inſured in caſe of Loſs, Ground-Rents to the value of near 3000*l. per Annum*, are ſettled on Truſtees to anſwer the ſame. The *Premium* or Rate of Inſuring an Hundred Pounds on Brick Houſes, is Eight Shillings for one Year, (and double for Timber) and ſo in proportion for a leſſer Sum: and if any Inſure for a longer Term, the Diſcount for paying down the Money, is after this rate; Three Years and a Quarter is paid for four Years Inſurance; five for ſeven Years; and ſeven for eleven. The Money Inſured on the Houſe is to be paid as often as the Houſe is burn'd or demoliſh'd within the Term Inſured; but if damaged, then to be repair'd at the Charge of the Office. This excellent Security for ſuch Misfortunes, His Majeſty has highly approv'd of in Council; and for the better encouraging the Undertakers and firſt Inventers, has been lately graciouſly pleaſed to grant his Letters Patents to them for carrying on ſo great and good a Work for the good of the Publick.

CHAP. VIII.

CHAP. VIII.

Of Priſage and Butlerage

I. *What* Priſage *is, and where taken, and of what.*
II. *Merchant Strangers exempted from the ſame.*
III. *When due, and the exemption of the Citizens of* London *from the ſame.*
IV. *What Citizens are capable and where not.*
V. *A Foreigner imports and makes a Citizen Executor and dies; whether he ſhall have the Benefit of the Immunity.*
VI. *Where a Foreigner ſells to a Citizen before Bulk be broken, the Vendee ſhall be chargeable.*
VII. *Where a Grant to diſcharge a particular Ship ſhall be good; and where a Grant to particular Perſons ſhall be otherwiſe.*
VIII. *Of* Butlerage, *what, and who are exempted.*
IX. *Where the King becomes entituled to thoſe Duties.*
X. *A Grant to be free of all Cuſtoms, Impoſitions,*&c. *extends not to* Priſage *and* Butlerage.
XI. *Cinque Ports exempted from* Priſage.

I. PRiſage is a certain taking or purveyance for Wine to the King's uſe; the ſame is an ancient Duty which the Kings of *England* have, time out of mind, had and received; the manner hath been by taking of every Ship or Veſſel that ſhould come into this Realm, if ten Tun, to have for Priſage one Tun: And if it contain 20 Tun or more, to have two Tun (*viz.* one Tun before the Maſt,) and the other behind the Maſt, paying 20*s.* for each Tun. This ancient Immunity they have enjoyed as a Flower of the Crown, and by ſome has been conceived not grantable away without Act of Parliament. But yet in 6 *E.* 3. *fol.* 3. Caſe 15. mentions the ſame to be grantable over. *Dyer* 92. 42, 165. *Fleta, l* 2. *c.* 2. *Salk.* 617.

II. King *Edward* the Firſt having laid ſome Impoſitions on the Merchants, which in *Anno* 25. of his Reign, being taken away, with promiſe, that neither he nor his Succeſſors ſhould do any ſuch thing without Aſſent of Parliament. In the one and thirtieth of his Reign they granted him an increaſe of Cuſtoms; in lieu of which he granted them many Immunities, as Releaſe of *Priſage*; &c. *Rot. Parl.* 31. *E.* 1 *cap.* 1, & 2.

therwiſe he might be cozened, the Freighter perhap lading other Commodities aboard after the Maſt.

If there be but one Tun taken out, yet the duty muſt be paid: The reaſon is, for that otherwiſe the Officer ſhould be obliged to travel perhaps all over the Kingdom.

X. The King granted to a *Venetian* Merchant that he ſhould be quit, *de omnibus Cuſtumis, Subſidiis, & Impoſitionibus, & omnibus aliis denariorum ſummis debitis & ſolubilibus pro quibuſcunque Merchandizis importandis*; and that he ſhould be as free as the Citizens of *London*. In that caſe it was adjudged in the *Exchequer*, That by that Grant the King did not diſcharge him of *Priſage*, becauſe the Priſage was not ſpecially expreſſed in the Grant, although that the City of *London* were by a ſpecial Charter freed of Priſage.

Vouched in the Caſe of Cuſtoms in Sir *John Davies* Reports.

XI. The Cinque Ports are likewiſe diſcharged of *Priſage*; yet if a Citizen of *Salisbury* ſhould conſign Wines to be delivered and unladed at *Dover*, the bare diſcharge of the Goods at that Port will not acquit the Importer from the Duty; for it is not the Parties Importation, but his Domicil that qualifies him for the benefit of his Immunity.

Cl. 1 E. 1. m. 5.

Bulſtrod. 3 *part fol.* 1.

CHAP. IX

CHAP. IX.

Of Pilots, Wharfage, Primage, Average, Lodmanage.

I. *Of the* Pilots *charge till the Ship is brought to her place or bed.*
II. *If the Ship is likely to miſcarry, what the Ships Crew may do at ſuch time.*
III. *Of ignorant Pilots their puniſhment, and if the Ship miſcarries, who ſhall anſwer.*
IV. *Of Wharfage, and where the Wharfingers ſhall anſwer, and where not.*
V. Primage *and* Petilodmanage *where due, and for what; and if the Ropes break, whether the Maſter, or Wharfinger ſhall anſwer.*
VI. Petty Average *where due, and for what, and Hat-mony.*
VII. Lodmanage *where due, and for what.*

I. BY the Laws of *Oleron* after that the Pilot hath brought the Ship to ſure Harbour, he is no further bound or liable; for then the Maſter is to ſee her bed and to her lying, and bear all the reſt of her Burthen, Charge, and Danger, except that of the act of God; So that before ſhe comes to her place or bed, and while ſhe is under the Pilot's charge, if ſhe or her Goods periſh, or be ſpoiled, the Pilot muſt make good the ſame.

II. By the Laws of *Oleron*, if his fault is notoriouſly groſs, that the Ships Crew ſees an apparent Wreck, they may then lead him to the Hatches, and ſtrike off his Head; but the Laws of *England* allow no ſuch haſty Execution. *Leg. Oleron, cap.* 23.

By the Laws of *Denmark*, an ignorant Pilot is to paſs thrice under the Ships Keel.

The Maſter generally in the Charter-party covenants to find a Pilot, and the Merchant covenants to pay him his Pilotage.

III. But if a Ship ſhould miſcarry coming up the River, under the charge of the Pilot, it has been a Queſtion, whether the Maſter ſhould anſwer in Caſe of the inſufficiency of the Pilot; or whether the Merchant may have his remedy againſt both? It hath been conceived the Merchant hath his election to charge either;

and if the Maſter, then he muſt lick himſelf whole of the Pilot.

22 Car. 2. c. 11. §. 21. IV. *Wharfage* is Money paid for landing Wines at a Wharf, or for ſhipping or taking in Goods into a Boat or Barge; they commonly keep Boats or Lighters of their own for the carrying out and bringing in of Goods, in which if a loſs or detriment happens, they may in ſome caſes be made liable.

An Action of the Caſe grounded on the Cuſtom of the Realm was brought againſt the Defendant, Maſter of a Wharf, for not ſafe delivering of Goods, &c. The Caſe appeared to be thus: The Maſter unladed a Bale of Silk into the Wharfingers Lighter, and ſent part of his Mariners to convey it aſhore; it happened that the Goods were ſtole: The Queſtion was, Whether the Wharfinger or the Maſter ſhould anſwer? Upon a Tryal at *Guild-Hall* before my Lord Chief Juſtice *Hales*, it was there Rul'd, That the Maſter was liable, and not the Wharfinger; for till they are landed, the Maſter hath them under his Power: But if Goods are to be ſent aboard, there if they miſcarry in their Paſſage, the Wharfinger muſt anſwer.

Randall verſus Hilton & Butler, Paſch. 26. Car. in B. R.

32 *H.* 8. 14. *Cowel Interp. verb. primage.* V. *Primage* and *Fetilodmanage* is likewiſe due to the Maſter and Mariners for the Uſe of his Cables and Ropes to diſcharge the Goods, and to the Mariners for loading and unloading of the Ship or Veſſel; it is commonly about twelve Pence *per* Tun.

Leg. Oleron, cap. 10. If the Ropes break in hoiſting of Goods out of the Ship into the Lighter or Boat, the Maſter muſt anſwer if the Goods be damnified or loſt.

But if the Ropes break at the Crane in taking them out of the Lighter, (although till they are landed, they are not out of the Maſters Cuſtody) yet the Wharfinger ſhall anſwer.

VI. *Petty Average* is another little ſmall Duty which Merchants pay to the Maſter when they only take Tunnage over and above the Freight, the which is a ſmall recompence or gratuity for the Maſters care over Lading; and in the Bills of Lading they are expreſt after Freight, together with *Primage* and *Average* accuſtomed.

Some conceive that the Average mentioned in the Bills, is that which is the Average or Contribution for loſſes.

The *French* Ships commonly term the Gratuity *Hatmoney*,

money, and our *Engliſh* Merchants pay it our Maſters over the Freight; it is ſometimes more, ſometimes leſs; two or three Pieces.

VII. *Loadſman*, is he that undertakes to bring a Ship ſafe through the Haven to the Key or Place of Diſcharge, and if through his ignorance, negligence, or other fault he ſuffereth the Ship or Merchandize to periſh, an Action lyes againſt him at the *Common Law*; and ſo by ſome conceived he may be puniſhed in the Admiralty, but not in both. *Roughton Artic. Enquiry, fol.* 27, 28.

The Hire is called *Lodmanage*, the which the Pilot receives of the Maſter for conducting the Ship up the River, or into the Port to her convenient Bed.

If two Ships lye in a Harbour and the Anchor of one is feared may occaſion damage to the other, if after requeſt and refuſal (and there be probable cauſe) the other may take up the Anchor, and let the ſame down at a further diſtance, and the ſame, if oppoſed or hindred and any damage happen thereby, they are to make full Satisfaction; ſo it is if they lay out an Anchor, and neglect the placing of a *Buoy* to the Anchor, and damage happen thereby, they are not only ſubject to be puniſhed in the Admiralty, but likewiſe to render ſatisfaction to the Party damnified. *Per Leg. Oleron. cap.* 15.

If two Ships be in the River, and the one falls foul on the other, both being laden, by the Law Marine the Contribution is to be in Common, and to be equally divided and appraiſed half by half; but then the *Mariners* muſt ſwear there was no fault in them: For otherwiſe one that hath an old rotten Veſſel which he can no ways diſpoſe of, may ſo order the matter as to lay her in the way of a good Ship under Sail, ſo that the ſame may be anſwered in damage: But when the Contribution is made equal, then the Contrivance will be avoided; but at the *Common Law* there can be no ſuch Judgment, for one of them muſt be found guilty; and if ſo, he muſt anſwer the others Damage, and for his own he may ſit down by the loſs. *Per Leg. Oleron. cap.* 14.

CHAP. X.

Of Bills of Exchange.

I. *Of the Antiquity of* Exchange *by the* Hebrew *Law.*
II. *Of the Antiquity of* Exchange *by the* Romans.
III. *Of Exchanges by other Nations in imitation of thoſe People.*
IV. *Of the ſeveral ſorts of Exchanges, and of* Cambio commune.
V. *Of* Cambio *real, or Exchanges value for value.*
VI. *Of* Cambio ſicco, *or dry Exchanges.*
VII. *Of* Cambio fictitio, *or feigned Exchange.*
VIII. *Of the Exchanges uſed this day, and on what.*
IX. *How Exchanges are made, and upon Monies in* London.
X. *Monies paid generally, how repaid by Exchange, how an Action ſhall be brought for Guineas, or Foreign Coin.*
XI. *Of Bills of Exchange payable at ſingle uſance.*
XII. *Bills of Exchange at double or treble uſance, and of the cuſtomary uſances to certain places from* London *and* Amſterdam *to other places.*
XIII. *Of the nature of Bills of Exchange, and how eſteemed of by the Laws of* England.
XIV. *Bills drawn more than one, no prejudice to the Parties; and of the true meaſure of judging on Bills by Cuſtom.*
XV. *What amounts to an acceptance generally, and on refuſal where to be proteſted. Indebitat. Aſſumpſit upon a general acceptance.*
XVI. *All the Drawers are made liable; and whether the Party to whom the Money is made payable, is bound to procure an acceptance.*
XVII. *Proteſt, what is meant by the ſame; and where the ſame is neceſſary, and where not. Proteſt upon the Stat. of 9 & 10 Wil. 3. cap. 17.*
XVIII. *Bill drawn on two Perſons, where the ſame is neceſſary, and where not.*
XIX. *One Factor ſerves a Company, where a Bill accepted of his by one of the Company, obliges the reſt, and where not.*
XX. *What words amount to an acceptance, and what not.*
XXI *Where a Bill may be accepted for part, and what muſt be done with the Bill thereupon.*
XXII. *When a Countermand may legally be made, and when not.*
XXIII. *How the ſeveral Parties intereſſed in a Bill of Exchange are obliged and fettered to each other.*
XXIV. *How a collateral Security may be annexed to a Bill when the time is elapſed for non-payment.*
XXV. *Where the Proteſt is only neceſſary to be kept, and where that and the Bill muſt both be remitted.*
XXVI. *Bill loſt, what is neceſſary for the Parties intereſſed in*

in ſuch caſe to act.
XXVII. Of blank Endorſments, the validity of the ſame.
XXVIII. A Bill once accepted, whether the ſame may be revoked; and whether it may be accepted to be paid at a longer time than is mentioned: And what Proteſts are then neceſſary to be made.
XXIX. Of Bills accepted for the honour of the Drawer, where the ſame ſhall oblige.
XXX. The time cuſtomary allowed for payment after failure of payment at the day.
XXXI. Of the Validity of ſpeedy Proteſts in relation to recover the money to be paid on the Drawer.
XXXII. Bill accepted, and before the day of payment the Acceptor is a failing, what's neceſſary to be done in reference to the obtaining better Security.
XXXIII. Bills accepted for the honour of the Drawer, where turned into an Act, and remitted by him that gives honour to the Bill.
XXXIV. The Acceptor ready to pay, but the Party to whom made payable is dead, what is neceſſary.
XXXV. Cauſes general for a Proteſt, and where ſatisfaction to the deliverer diſcharges all Parties.
XXXVI. Of Exchange by way of Credit.
XXXVII. One pays a Bill before it be due, and the Party to whom the ſame was paid, fails, where he ſhall be anſwerable to the Drawer notwithſtanding.
XXXVIII. Of Bills aſſignable over according to the Cuſtoms of Merchants, what Operation in England.
XXXIX. Where an Averment is neceſſary of Defendant's being a Merchant.

I. THE Exchange for Monies is of great Antiquity as well by obſervation of the *Hebrew* Cuſtoms, as thoſe of the *Romans*.

Upon the firſt of the Month *Adar*, Proclamation was made throughout all *Iſrael*, That the People ſhould provide their half *Shekels*, which were yearly paid towards the Service of the *Temple* according to the Commandment of *God*, on the 25*th* of *Adar*, then they brought *Tables* in the Temple, (that is, into the outward Court Where the People ſtood) on theſe Tables lay the leſſer Coyns which were to furniſh thoſe who wanted half *Shekels* for their Offerings, or that wanted leſſer pieces of Money in their payment for *Oxen*, *Sheep*, *Doves* and the like, which ſtood there in a readineſs in the ſame Court to be ſold for *Sacrifices*; but this ſupply and furniſhing the People from thoſe *Tables* was not without an *Exchange* for other Money, or other things in lieu of Money, and that upon advantage: Hence all thoſe that

Exod. 30, 31.

Moſes Kotſenſes, printed at *Venice*. *An.* 1557 *de Sicliis. fol.* 122. *Col.* 2.

that ſate at the Tables were called chief *Bankers*, or Maſters of the *Exchange*.

II. By the *Romans* it is ſuppoſed to be in uſe upwards of 2000 Years, Monies being then elected out of the beſt of Metals to avoid the tedious Carriage of Merchandize from one Country to another: So other Nations imitating the *Jews* and *Romans*, erected Mints, and coined Monies, upon which the Exchange by Bills was deviſed, not only to avoid the danger and adventure, but alſo its troubleſome and tedious Carriages.

Alex.Gen.dier. lib. 5. cap. 30.

III. Thus Kingdoms and Countries having by their Sovereign Authorities coyned Monies, cauſed them to appoint a certain Exchange for permutation of the various Coyns of ſeveral Countries, without any tranſportation of the Coyn, but giving *par pro pari* or *value for value*, with a certain allowance to be made thoſe *Exchangers* for accomodating the Merchants.

IV. As Commerce became various, ſo Exchange numerous; but generally reduced to four, *Cambio commune*, *Cambio real*, *Cambio ſiccè*, and *Cambio ficitio*,

Reg.Orig 194. *Statut.* 5. *R.* 2. *cap.* 2. 3 *H.* 7. 6.

Cambio commune, in *England* was thoſe that were conſtituted by the ſeveral Kings, who having received Monies in *England*, would remit by Exchange the like ſum to be paid in another Kingdom. *Edward* the Third, to aſcertain the Exchange, cauſed Tables to be ſet up in moſt of the general Marts or Ports of *England*, declaring the Values of all or moſt of the foreign Coyns of thoſe Countries where his Subjects held Correſpondence or Commerce, and what allowances were to be made for having Monies to be remitted to ſuch Countries or Kingdoms.

18 *E.* 3. *Acton Burnel.*

V. *Cambio real*, was when Monies were paid to the Exchanger, and Bills were drawn, without naming the ſpecies; but according to the value of the ſeveral Coyns, which two Officers afterwards were incorporated, and indeed was no more but upon payment of Monies here in *England* to be repaid the juſt value in Money in another Country, according to the price agreed upon between the Officer and Deliverer to allow or pay for the Exchange of the Money, and the loſs of time.

VI. *Cambio ſiccè*, or dry Exchange, is when a Merchant

chant hath occaſion for 500 *l.* for a certain time, and would willingly pay intereſt for the ſame; the Banker being deſirous to take more than the Statute gives, and yet would avoid the ſame, offers the 500 *l.* by Exchange for *Cales*, whereunto the Merchant agrees; but the Merchant having no Correſpondence there, the Banker deſires him to draw his Bill, to be paid at double or treble uſance, at *Cales*, by *Robbin Hood*, or *John a-Nokes* (any feigned Perſon) at the price of Exchange then currant; accordingly the Merchant makes the Bill, and then the Banker pays the Monies; which Bill the Banker remits to ſome Friend of his to get a Proteſt from *Cales* for non-acceptance, with the Exchange of the Money from *Cales* to *London*, all which with Coſts, the Merchant is to repay to the Banker; ſometimes they are ſo conſcientious as not to make above 30 *per Cent.*

The uſury was firſt introduced by the *Jews* here in *England*. *Vid.Co.* 2. *Inſt.* *fol.* 506.

VII. *Cambio ficitio*, when a Merchant hath occaſion for Goods to Freight out his Ship, but cannot well ſpare Money; the Owner of the Goods tells him he muſt have ready Money; the Buyer knowing his drift, it is agreed, That the Seller ſhall take up the Monies by exchange for *Venice*, or any other parts; but then the Merchant muſt pay for exchange, and re-exchange.

So likewiſe where the Merchant is become indebted to the Banker, they are contented to ſtay, the Merchant paying exchange or re-exchange; the which he will moſt certainly compel him to do.

Theſe two laſt ways of grinding the Face of the generous Merchant was afterwards prohibited, but notwithſtanding it was found impoſſible to moderate the inequality of Exchanges, and to have value for value: So that at this day it ſeems to be a Cold that many an honeſt Man is apt to catch. 3 & 4 *H.* 7.

VIII. The juſt and true Exchange for Monies that is at this day uſed in *England*, (by Bills) is *par pro pari*, according to value for value; ſo as the *Engliſh* Exchange being grounded on the weight and fineneſs of our own Monies, and the weight and fineneſs of the Monies of each other Country, according to their ſeveral Standards proportionable in their valuation, which being truly and juſtly made, aſcertains and reduces

duces the Price of Exchange to a ſum certain for the Exchange of Monies to any Nation or Country whatſoever: As for inſtance,

If one receives 100*l.* in *London* to pay 100*l.* in *Exeter*; this by the *par*.

But if a Merchant receives 100*l.* in *London* to pay 100*l.* at *Paris*, there the Party is to examine and compare the *Engliſh* weight with the weight of *France*, the fineneſs of the *Engliſh Sterling* Standard with the fineneſs of the *French* Standard; if that at *Paris* and that at *London* differ not in proportion, then the exchange may run at one price, taking the Denomination according to the Valuation of the Monies of each Country; but if they differ, the price accordingly riſes or falls: And the ſame is eaſily known by knowing and examining the real fineneſs of a *French* 5*s.* Piece and an *Engliſh* 5*s.* Piece, and the difference which is to be allowed for the want of fineneſs or weight, which is the exchange, and ſo proportionably for any ſumms of Monies of any other Country, the which is called *Par*, or giving value for value.

But this Courſe of Exchange* is of latter years abuſed, and now Monies are made a meer Merchandize, and does over-rule Commodities, and Monies riſe and fall in price according to the plenty and ſcarcity of Money.

* And therefore ſome are of Opinion, that there can be no certain rate ſet on the *Par* in Exchange, to anſwer juſtly the value of the Coyns of Foreign parts, by reaſon of the diverſity of them, and of their intrinſick values. *Vide* Sir *Robert Cottons* Poſthuma, *fol.* 306.

IX. As Money is the common meaſure of things between Man and Man within the Realm, ſo is Exchange between Merchant and Merchant within and without the Realm; the which is properly made by Bills when Money is delivered ſimply here in *England*, and Bills received for the repayment of the ſame in ſome other Country, either within the Realm or without the Realm, at a price certain, and agreed upon between the Merchant and the Deliverer. For there is not at this Day any peculiar or proper Money to be found in *ſpecie* whereupon Out-land Exchanges can be grounded; therefore all Foreign Coyns are called imaginary.

At

At *London* all Exchanges are made upon the pound ſterling of 20s. and 12*d.* to the Shilling; for *Germany, Low-Countreys*, and other places of Traffick; and for *France* upon the *French* Crown: For *Italy, Spain*, and ſome other places, upon the Ducat: For *Florence, Venice*, and other places in the *Streights*, commonly by the Dollar and Florin.

Note, in an Action on the Caſe upon a Bill of Exchange, it was ſaid in *Vernatti et Dubuſſe's* Caſe, Special Bail is not required in a Writ of Error by the Stat. of 3. *Jac.* 1. *cap.* 8. becauſe an Action upon the Caſe is not within that Stat. but only Actions of Debt; for had this been aided by 3 *Jac.* 1. there needed no proviſion by the Stat. of Car 2. 2 Keeb. 234. 2 *Bulſtr.* 53, 54. 15, 17 Car. 2. c. 8. §. 3.

X. Bills drawn to be paid, are either at ſight, or a time certain, ſingle, double or treble uſance, and are commonly about three, for fear of any miſcarriage.

The taking and delivering Money at ſight binds the taker up to give his Bill to pay at ſight, or within ſome ſhort time the like ſum after ſuch a rate the Pound, Dollar, Ducat or Crown, as is agreed between them in Foreign Coyn, either according to the valuation of Monies, or current Monies for Merchandize.

See what Action and how ſhall be brought for Guineas, foreign Coyn, in *Pope* and *S. Legers* Caſe, 1. *Lutwich* 484. 1. *Leon.* 41. *Wilſhalge* against *Davidge*. 3 *Cro.* 536. *Bagſhaw* againſt *Playn.* 2 *Cro.* 617. *Rands* v. *Peck. Latch*, 77, 84. *Wards* Caſe. *Guineas foreign Coyns.* 4 *Mod.* 409.

XI. The ſecond time of payment is called *Uſance*; it is known or taken to be the compaſs of one Month, to be computed from the date of the Bill, and that governed according to the cuſtom of the place where thoſe Exchanges do run. For which Reaſon in an Action on a Bill of Exchange payable at Uſance, the Plantiff muſt ſhew what the Uſance is. *Salk.* 135.

XII. The third is double or treble *Uſance*, two or three Months: Sometimes there are Exchanges made upon half *Uſance*.

The times of payment do alter the price of Exchanges according to time, commonly after 12, 15, or 20 in the Hundred by the year.

Middle-

Uſance from London to	*Middleborough*, *Amſterdam.* *Antwerp*, *Bruges*, *Rotterdam*, *Liſle*, *Roan*, *Paris*	are generally accounted one Months time from the Date of the Bill.	The Bills may have a larger, ſometimes a ſhorter time, there is no direct certainty, but only that ſingle Uſance is a Month, double Uſance two Months, &c.
Uſance from *Amſterdam* to	*Rome*, *Genoa*, *Venice*, *Naples*, *Palermo*, *Luca*, *Sevil*, *Lisbon*	are generally accounted two Months from the Date, &c.	
From *London* to	*Florence*, *Venice*, *Leghorn*, *Zant*, *Aleppo*, *Luca*	is ſometimes accounted treble Uſance from the Date of the Bill.	

XIII. *Excambium vel Cambium*, or as the Civilians term it, *Permutatio*; *Billa Excambii* ſignifies no more but a cuſtomary Bill, ſolemnized by numerous conſent of Traders, to have a reſpect more than other Bills, though of as high and as intrinſecal a value: And thoſe that give ſuch Bills are called *Exchangers* or *Bankers*.

Reg. Orig. fol. 194. *Statut.* 5 *R.* 2. *cap.* 2.

Though the Act was no more but to keep up the life of Commerce, (without which it is impoſſible for any Nation to flouriſh) yet could not any Perſon draw ſuch Bills, or return Money beyond Seas, without Licence firſt obtained of the King. But at this day any Man may do it without being obliged to obtain ſuch leave.

XIV. Such a Bill being drawn, they commonly take one or two more of the ſame date word for word, only this Clauſe is inſerted in the ſecond, *My firſt of the ſame date, Perſons and ſumm not being paid:* And in the third

third, *My firſt and ſecond of the ſame date, and contents not being paid.*

The right meaſure of judging on Bills of Exchange, is purely by the laudable Cuſtom often reiterated over and over, by which means the ſame hath obtained the force of a Law, and not the bare and ſingle Opinion of ſome half-fledg'd Merchants: For Bills of Exchange are things of great Moment as to Commerce, and are neither to be ſtrained ſo high, as that a Man ſhould not caſt his eye on them, but the ſame ſhall be taken to be an *acceptance*: Nor on the other hand, having duly accepted them, the ſame ſhould be raſhly and unadviſedly avoided, by the ſhallow fancy of ſuch nimble-pated ſhufflers; but they are ſoberly judged and governed, as the ſame hath generally been approved of and adjudged of in former Ages.

Conſuetudo quandocunq; pro lege ſervatur, ſaith *Bracton*, *in partibus ubi fuerit more utentium approbata; longevi enim temporis uſus & conſuetudinis non eſt vilis authoritas, lib.* 1. *cap.* 3.

XV. A Bill being remitted, the Party is to go immediately to the Perſon to whom the ſame is directed, and preſent the ſame in order to his acceptance; if it be tendred, and the Party ſubſcribes *Accepted*; or *Accepted by me A. B.* or being in the *Exchange* ſays, *I accept the Bill, and will pay it according to the Contents*; this amounts without all Controverſie to an Acceptance.

But if the ſame be refuſed, the Party muſt then procure a *Proteſt*, and remit the ſame to the *Deliverer*, who is to reſort to the *Drawer* for Satisfaction for the principal coſts and damage.

Words are made to ſignifie things; by the word *Deliverer* is meant he that pays the Money beyond Sea. By the word *Drawer*, he that writes or draws the Bill of Exchange; the Perſon upon whom, is called the *Acceptor*.

The queſtion whether a general *Indebitat. Aſſumpſit* will lie upon a bare acceptance of a Bill of Exchange, in the Argument of the Caſe of *Bellaſis* and *Heſter*. By Juſtice *John Powel*, a general *Indebitat. Aſſumpſit* does not lie on a Bill of Exchange; but it ought to be a ſpecial Declaration upon the Cuſtom of Merchants, as in the Caſe of *Brown* and *London*. 1 *Levins* 298. 1 *Mod.* 285. 2 *Keeble.* 695, 731, 758, 822. 1 *Vent.* 152. In which Caſe, Judgment was arreſted after Verdict as reported by *Levins* and *Ventris*.

Hard. 485, 486. *Salk.* 125.

In the Caſe of *Bromwich* and *Lades*, it was ſaid by the Chief Juſtice *Treby*, that Bills of Exchange were of ſuch

ſuch general Uſe and Benefit; that upon an *Indebitat. Aſſumpſit*, a Bill of Exchange may be given in Evidence to maintain the Action; and by Mr. Juſtice *Powel*, that upon a general *Indebitat. Aſſumpſit*, for Monies received to the uſe of the Plaintiff, ſuch Bill may be left to the Jury to Determine, whether this was for value receiv'd or not. In this Caſe the Declaration was on the Cuſtom of Merchants, and a general *Indebitat. Aſſumpſit* thereon. See the Declaration and Exceptions to it, of the ſaid Caſe of *Bellaſis* and *Heſter*, in 1. *Lutwich*, 1589.

By the Stat. of the *9th* and *10th* of *Will* 3. cap. 17. It is enacted that after the *24th* of *June* 1698. All Bills of Exchange drawn in, or dated at, and from any Place of this Kingdom of the Sum of 5*l.* or upwards upon any Perſon in *London*, or any other Trading City, Town or Place (in which Bills, the value ſhall be expreſſed to be received) drawn payable at a certain time, after the Date thereof, may after acceptance in Writing, and the expiration of three Days after the ſame ſhall be due, be proteſted by a Notary Publick, or in default of ſuch Notary Publick, by any other ſubſtantial Perſon of the Place before two Witneſſes; refuſal or neglect being firſt made of due Payment; which proteſt ſhall be made under a Copy of the Bill, in the form preſcribed by the Act, and ſhall be notified within 14 Days after, to the Party from whom the Bills were received, who (upon producing ſuch Proteſt) is to Repay the ſaid Bills with Intereſt and Charges from the Proteſting; for which Proteſt there ſhall not be paid above 6*d.* And in Default of ſuch Proteſt, or due notice thereof, the Perſon ſo failing ſhall be liable to all Coſts, Damages and Intereſt thereupon. Provided that if any ſuch Inland Bills be loſt, or miſcarry within the time limited for Payment of the ſame, the Drawer of the ſaid Bills ſhall give other Bills of the ſame Tenor, Security being giving to Indempniſie him, in Caſe the ſaid Bills ſo loſt or miſcarried be found again.

Salk. 128. 2 *Mod. Caſ.* 80.

A Writ of Error was brought on a Judgment by *Nil dicit* in an Action againſt the Drawer of an Inland Bill of Exchange; and it was objected, that ſince the Act of

9 W.

9 *W.* 3. no Damages ſhall be recovered againſt the Drawer upon a Bill of Exchange without a Proteſt, and therefore the Action lies not, there being no proteſt.

But *Holt* Ch. J. The Statute never intended to deſtroy the Action for want of a Proteſt, but only to deprive the Party of recovering Intereſt and Coſts upon an Inland Bill againſt the Drawer without Notice of non-payment by Proteſt; for before the Statute there was this Difference between foreign and Inland Bills of Exchange: If a Bill was foreign, one could not reſort to the Drawer for Non-acceptance or Non-payment without a Proteſt, and reaſonable Notice thereof; but in Caſe of an Inland Bill, there was no occaſion for a Proteſt, but if any Prejudice happened to the Drawer by the Non-payment of the Drawee, and that for want of Notice of Non-payment, which he to whom the Bill is made ought to give, the Drawer was not liable; and the Word *Damages* in the Statute, was meant only of Damages that the Party is at by being longer out of his Money by the Non-Payment of the Drawee, than the Tenour of the Bill purported, and not of Damages for the Original Debt: And the Proteſt was order'd for the Benefit of the Drawer; for if any Damages accrue to the Drawer for want of Proteſt, they ſhall be born by him to whom the Bill is made; and if no Damages accrue to him, then there is no Harm done him, and a Proteſt is only to give formal Notice that the Bill is not accepted, or accepted and not paid; and if in ſuch Caſe the Damage amount to the Value of the Bill, there ſhall be no Recovery, but otherwiſe he ought not to loſe his Debt; but that ought either to appear by Evidence upon *Non aſſumpſit*, or by ſpecial pleading; and the Act is very obſcurely and doubtfully penn'd, and we ought not by Conſtruction upon ſuch an Act to take away a Man's Right. And the Judgment was affirmed *per totam Curiam.*

What Actions lie upon a Bill of Exchange, and how to be brought, and againſt whom, See *Hardreſs* 487. in *Scaccario*, and *Brown* and *London*'s Caſe, 1 *Mod.* 285 1 *Levins* 298. and 2 *Keeble* 695. and the Caſe of *Cramlington* againſt *Evans* and *Percival*, 2 *Vent.* 307.

XVI. If there be ſeveral *Drawers* who ſubſcribe, all are liable in caſe of a Proteſt.

If a Bill is drawn upon a Merchant in *London* payable to *J. S.* at double Uſance, *J. S.* is not bound in ſtrictneſs of Law to procure an acceptance, but only tender the Bill when the Money is due: But Merchants who generally have generous Spirits, will not ſurprize a Man, but firſt procure an acceptance, or at leaſt leave the Bill for the Party to conſider and give his anſwer, and then give advice of the ſame, and if the Money be not paid, then Proteſt.

Nor is any ſuch thing as a three days reſpite to be allowed for acceptance.

XVII. A Proteſt is no more but to ſubject the *Drawer* to anſwer in caſe of non-acceptance, or non-payment; nor does the ſame diſcharge the Party Acceptor, if once accepted, for the Deliverer hath now two Remedies, one againſt the *Drawer*, and the other againſt the *Acceptor*.

To entitle the Party to an Action at Law in *England* againſt the Acceptor, it matters not whether there be a Proteſt; but to entitle the Party to a recovery againſt the Drawer beyond the Seas or elſewhere, there muſt be a Proteſt befor a Publick Notary.

If a Merchant hath accepted a Bill, and before the ſame becomes to be due, he proves inſolvent, or at leaſt his Credit is publickly blaſted, a Proteſt ought to go.

If a Merchant to whom the Bill is payable, be Abſent, ſick or like to die, any Friend or Servant of his, may cauſe a Proteſt to be made.

2 *Keb.* 584. *A.* draws a Bill upon *B.* to the uſe of *C.* and upon non-payment, *C.* proteſts the Bill, he cannot Sue *A* unleſs he gives notice that the Bill is proteſted, for *A.* may have Effects of *B.* in his Hands, by which he may ſatisfie himſelf, 1 *Vent.* 45.

By the Statute 3, 4 *A. c.* 9. It is enacted, that if the Party on whom an Inland Bill of Exchange ſhall be drawn, ſhall refuſe to accept the ſame by under writing it, the Party to whom the ſame is made payable may and ſhall cauſe ſuch Bill to be proteſted for Non-acceptance.

No Acceptance of ſuch Inland Bill of Exchange ſhall be ſufficient to charge any Perſon, unleſs the ſame be unde-

underwritten or indorſed in Writing thereupon; and if ſuch Bill be not accepted by ſuch underwriting or Indorſement, no Drawer ſhall be liable to pay any Coſts, Damages or Intereſt thereon, unleſs ſuch Proteſt be made for non-acceptance thereof, and within fourteen Days after ſuch Proteſt, the ſame be ſent, or Notice thereof be given to the Party from whom ſuch Bill was received or left in writing at the place of his uſual abode.

If ſuch Bill be accepted and not paid before the Expiration of three Days after the ſame ſhall become due, then no Drawer ſhall be compellable to pay any Coſts, Damages or Intereſt thereon, unleſs a proteſt be made and ſent or Notice thereof be given in manner abovementioned: Nevertheleſs, every Drawer ſhall be liable to pay Coſts, Damages and Intereſt if a proteſt be made for non-acceptance or non-payment and Notice thereof be ſent, given, or left as aforeſaid.

Such proteſt is not neceſſary unleſs the Value be acknowledged in ſuch Bill to be received, and unleſs the Bill be drawn for 20 *l.* or upwards.

If any Perſon accepts ſuch Inland Bill of Exchange in Satisfaction of a former Debt, the ſame ſhall be eſteemed a compleat Payment of ſuch Debt, if the Perſon accepting ſuch Bill for his Debt doth not take his due Courſe to obtain Payment thereof by endeavouring to get the ſame accepted and paid, and make his proteſt as aforeſaid.

XVIII. A Bill drawn on two jointly muſt have a joint acceptance, otherwiſe it muſt be proteſted; but to two or either of them, *é contra.* *Per Jaſonem in lege allegantur ff. de conditio ab. indebiti.*

Then if the ſame be accepted by one, it is purſuant to the tenour of the Bill, and ought not to be proteſted but in caſe of non-payment; and in that caſe the Perſon Acceptor is liable to an Action, but if it be on joint Traders, an acceptance by one will conclude and bind the other. *Salk.* 126.

XIX. A Factor of the *Hamborough*, *Turkey*, or *India* Company draws a Bill on the ſame, and a Member accepts the ſame, this perhaps may make him liable, but not another Member.

So it is if ten Merchants ſhall employ a Factor at the *Canaries*, and the Factor draws a Bill on them all, and

one of them accepts the Bill, and then refuſes payment; this will not oblige the reſt.

But if there be three joint Traders for the common ſtock and benefit of all three, and their Factor draws a Bill on them, the acceptance of the one will oblige the reſidue of the Company.

Winch. 24, 25. *Salk.* 126.

XX. A ſmall matter amounts to an acceptance, ſo that there be right underſtanding between both Parties: As *Leave your Bill with me, and I will accept it*; Or, *Call for it to morrow, and it ſhall be accepted*; that does oblige as effectually by the Cuſtom of Merchants, and according to Law, as if the Party had actually ſubſcribed or ſigned it, (which is uſually done.)

But if a Man ſhall ſay, *Leave your Bill with me, I will look over my Accounts and Books between the Drawer and I, and call to Morrow, and accordingly the Bill ſhall be accepted*, this ſhall amount to a compleat Acceptance: For this mention of his Book and Accounts was really intended to ſee if there were effects in his hands to anſwer, without which perhaps he would not accept of the ſame. And ſo it was Rul'd by the Lord Chief Juſtice *Hales* at *Guild-Hall*.

A Bill may be accepted for part, for that the Party upon whom the ſame was drawn, had no more Effects in his hands; which being uſually done, there muſt be a Proteſt, if not for the whole ſum, yet at leaſt for the reſidue: However, after payment of ſuch part there muſt be a Proteſt for the remainder.

Trin. 20. *Car.* 2. *in B. R.*

Before the time of payment of the Bill, the Party may notwithſtanding accept it, and pay it at the time of payment; or another may accept the Bill for the Honour of the Drawer, and if he pay it in default of the Party, yet before payment he is bound to make a Proteſt, with a Declaration that he hath paid the ſame for the Honour of the *Drawer*, whereby to receive his Money again.

The receiving of part of the Monies upon the Bill, does no ways weaken the Bills.

XXII. Any time before the Money becomes due, the Drawer may countermand the payment, although the Bill hath been accepted.

Per leg. publi. In ſi ff. depoſiti & per Bart. ibidem & per Romanum ſingulari, fol. 474.

The Countermand is uſually made before a Notary; but if it comes without, ſo it comes under the Parties hand, it is well enough.

If

If the Bill be accepted, and the Party deſires to have the Money before it be due, and it is paid, and then there comes a countermand; it hath been conceived that it ought not to be allowed; for as he could not enlarge the time, ſo he could not ſhorten it, but his Duty is to follow his Order.

XXIII. *Note*, The Drawer is bound to the Deliverer, and the Acceptor to the Party to whom the Bill is made payable; yet both are not bound to one Man, unleſs the Deliverer be a Servant to the Party to whom the Money is made payable; or the Party to whom the Money is made payable be Servant to the Deliverer: Yet both Taker and Acceptor are liable till the Bill is paid.

Aſſumpſit; and declares on the Cuſtom of *London*, that if any Merchant or other Perſon Merchandizing in *London*, make a Note in Writing under his Hand, and by this promiſeth to pay any Sum of Money to a Perſon in it named, or to the Bearer; and if the Perſon in the Note named, to whom by the Note it was promiſed to be paid, Aſſign or deliver it to another Perſon for to receive the Money to his own uſe, and he carries this to the Drawer of the Note, and requeſts him to pay the Money to him, then the Perſon that made the Note, was chargeable to pay this to the Bearer. That the Defendant (being a Goldſmith) made ſuch a Note, by it promiſing to pay a 100 *l.* to *W. B.* or the Bearer; and that *W. B.* delivered the Note to the Plantiff to receive the Money to his own uſe, in ſatisfaction of 100 *l.* due to him by the ſaid *W. B.* and that the Plantiff carried it, and ſhewed it to the Defendant and requeſted him to pay the 100 *l.* which he had not done; by which by the Cuſtom he became chargeable, and ſo promiſed to pay. After Verdict for the Plantiff, it was moved in Arreſt of Judgement; that this Cuſtom to pay to the Bearer was too general: For perhaps the Goldſmith before notice by the Bearer had paid it to *W. B.* himſelf, as in truth he had; and of ſuch Opinion was the Court, *Horton verſ. Cogs*, 3. *Levins* 299. where ſee the Pleadings.

Bill payable to the Bearer. *Salk.* 125.

(*a*) If the Plantiff recover againſt the Drawer of a Bill (tho' he has no Execution upon it) he ſhall not afterwards

Drawer and Indorſer.

(*a*) This Judgment was reverſed in the Exchequer Chamber, becauſe the Recovery, without Execution, was no Satisfaction. *Lutw.* 878, 882, *b.*

wards recover againſt any of the Endorſers. See the Caſe at large, *Claxton* and *Swift* 3. *Mod.* 86.

Styles, Paſch Anno 1654, *in B. R. fol.* 370.

XXIV. Therefore when you bring your Action, be ſure to draw your Declaration accordingly, and make the ſame part of the Cuſtom as you ſet it forth; for if you vary, you muſt expect to be nonſuited: And the Party is not bound to alledge a particular place of Demand.

If a Bill be returned proteſted for want of payment, the Drawer is to repay the Money and damage, or elſe he may procure a Security, which is no more but another Perſon of value ſubſcribes the Bill, in theſe and the like words, *I here underwritten to bind my ſelf as Principal, according to the Cuſtom of Merchants, for the ſum mentioned in the Bill of Exchange whereupon this Proteſt is made, Dated*, &c.

Now the Drawer, by virtue of this ſupplemental Agreement, hath as much time again to pay Monies as there was given him in the Bill when it was firſt drawn; ſo that if the Money be not paid, together with the Rechange and Charges of the Party, the Party may reecover the ſame on the Principal or Security.

* That is for not payment, the Bill being once accepted.

XXV. Beyond the Seas the Proteſt * under the Notary's hand is ſufficient to ſhew in Court, without producing the very Bill it ſelf. But if a Bill in *England* be accepted, and a ſpecial Action grounded on the Cuſtom be brought againſt the Acceptor, at the Tryal the Party Plantiff muſt produce the Bill accepted, and not the Proteſt; otherwiſe he will fail in his Action at that time.

Therefore it is ſafe that a Bill once accepted be kept, and only a Proteſt for non-payment be remitted; but a Bill proteſted for not acceptance muſt be remitted.

XXVI. If a Bill is left with a Merchant to accept, and he loſes the Bill, (or at leaſt it is ſo miſlaid, that it cannot be found) the party ſhall requeſt the Merchant to give him a Note for the payment according to the time limited in the Bill of Exchange; otherwiſe there muſt be two Proteſts, one for not acceptance, the other for non-payment: But if a Note is given for payment, and there happens to be a failure, yet in that caſe there muſt be a Proteſt for non-payment.

XXVII.

XXVII A Bill is remitted to *J. S.* who owes Monies to *J. D. J. S.* delivers the Bill to *J. D.* and on the back-ſide ſubſcribes his Name; if *J. D.* receives the Monies, he may fill up the blank as if the Monies had been actually paid to *J. S.* This is practiſed amongſt Merchants, and by them reputed firm and good. But certainly the *Common Law* looks upon this filling up of blanks after a Man hath once ſigned or ſealed, to be no better than a harmleſs forgery; but if there be either a general or ſpecial Authority to the purpoſe, it may then alter the Law. *Salk.* 128. By the Opinion of my Lord *Hales Hill.* 28. *Car. B. R.* at *Guild-Hall.*

Note, No Perſon, be it Wife or Servant, can accept of a Bill of Exchange to bind the Maſter without a lawful Authority, as a Letter of Attorney, and the like; which muſt be underhand, unleſs that it has been formerly and uſually done by the Wife or Servant in ſuch caſe, when the Maſter hath been out of Town, who hath approved of the ſame and anſwered payment: It muſt be uſually done; but one Partner may for another. *Styles* Reports *in B. R. fol.* 307.

A Servant of Sir *Robert Clayton*, and Mr. Alderman *Morris*, (but at that time actually gone from them) took up 200 Guineas of Mr. *Monck* a Goldſmith, without any Authority of his Maſters; (but *Monck* did not know that he was gone) the Monies not being paid, *Monck* brought an Action againſt Sir *Robert Clayton* and *Morris*, and at *Guild Hall* it was Rul'd *per Keeling* Chief Juſtice, That they ſhould anſwer; and there was a Verdict for the Plantiff. And though there were great endeavours to obtain a new Tryal, yet it was denied, the Court at *Weſtminſter* being fully ſatisfied that they ought to anſwer: For this Servant had uſed often to receive and pay Monies for them; and thereupon they actually paid the Monies. *Monck verſus Clayton* and *Morris Mich.* 22 *Car.* 2. *in B. R.*

Note, That which will oblige the Maſter, will be the authority and Liberty which he uſually gives the Servant; therefore ſuch a power devolved, ought to be ſecured by the prudenteſt way that may be: Which is generally done by Bonds and Obligations.

And though the ſame ſeems an Act of wiſdom for Merchants and others ſo to take, yet it oftentimes proves the deſtruction of many a Family. The Father puts out the Son perhaps with no leſs than 2 or 300 *l.* and is himſelf become bound for his Truth and juſt Accounting, *&c.* The Servant is immediately truſted with his Caſh, and then he too young to be experienced in the World, either neglects keeping a juſt Ac-

If a Bill of Exchange by contrary Wind or other occaſions be ſo long on the way, that the Uſance or time limited by the Bill be expired, and being tendred, both acceptance and payment are denied; Proteſts for both muſt be made, and the Drawer muſt anſwer the value, rechange and damage.

Raſtal, fol. 339. Bald in rubr. de conſtit. pecunia in ult. Col. & ſeq. quidem ff. eodem Col. penult.

XXVIII. A Bill once accepted, cannot be revoked by the Party that accepted it, though immediately after and before the Bill becomes due, he hath advice the Drawer is broke.

If a Bill is not accepted to be paid at the exact time, it muſt be proteſted; but if accepted for a longer time, the Party to whom the Bill is made payable, muſt proteſt the ſame for want of acceptance according to the tenour; yet he may take the acceptance offered notwithſtanding. Nor can the Party if he once ſubſcribes the Bill for a longer time, revoke the ſame, or blot out his Name, although it is not according to the tenour of the Bill; for by his acceptance he hath made himſelf debtor, and owns the draught made by his Friend upon him, whoſe Right another Man cannot give away, and therefore cannot refuſe or diſcharge the acceptance.

Note, This Caſe will admit of two Proteſts, perhaps three.

Bald. in leg pro debit C. de bon. auctor. Jud poſſiden. & per.

1. One Proteſt muſt be made for not accepting according to the time.
2. For that the Money, being demanded according

count, or keeping that, ſubjects his Maſter's Caſh to be ſpent by himſelf and thoſe who make it their ſole Trade to betray ſuch Youths. The Maſter finding the Conſumption, calls his Servant to account, who conſcious of the Act, forſakes his Service dares not ſee his Relations, and then as a general conſequence falls into Company, the which nothing but Providence can preſerve from taking their wicked courſes. The Father is called to anſwer, whatever the Maſter does ſay the Servant, hath ſpent or imbezeled, none being able to contradict him; he muſt with a heart full of grief ſubmit to pay, beſides the loſs of the Monies advanced upon the Servant's firſt putting forth: VVhich ſometimes proves a great affliction in a Family. On the other ſide, if Servants were not to be intruſted, the Myſtery could not be learnt, nor the Buſineſs diſpatched; and therefore faith muſt be given: But then it were juſtice and honeſty that as a Father puts perhaps the Child of his love to one in whom he repoſes a faith and truſt, that the Maſter ſhould be then as a Parent, ſo they ſhould prevent all occaſions that might ſubject them to temptations, and not be over-haſty in truſting them with the Caſh VVhich is the very Bait our *London* Gameſters catch ſuch Gudgeons with.

to

to the time mentioned in the Bill, was not paid.

3. If the Money is not paid according to that time that the Acceptor ſubſcribed or accepted.

Bartol. in leg. ſingul. Col. 7. ff. probatur.

A Bill was drawn payable the firſt of *January*, the Perſon upon whom the Bill was drawn accepts the Bill to be paid the firſt of *March*, the Servant brings back the Bill: The Maſter perceiving this enlarged acceptance, ſtrikes out the firſt of *March*, and puts in the firſt of *January*, and then ſends the Bill to be paid, the Acceptor then refuſes: Whereupon the Perſon to whom the Monies were to be paid, ſtrikes out the firſt of *January*, and puts in the firſt of *March* again: In an Action brought on this Bill, the queſtion was, Whether theſe alterations did not deſtroy the Bill? and Rul'd it did not.

Per L. C. J. Pemberton, inter Price & Shute, Paſch. 33 Car. 2. in B. R.

A. draws a Bill on *B.* and *B.* is in the Country; *C.* a Friend of his hearing of the Bill accepts it: The Party to whom the Money is to be paid, muſt make a proteſt for non-acceptance by *B.* and then he may take the acceptance of *C.* and it ſhall bind *C.* to anſwer the Money.

If a Bill is drawn on *B.* and *B.* happens to be in the Country, and a Friend of his deſires the Party not to proteſt, and he will pay the ſame, it is good, and ſhall bind ſuch Party.

Pinchard verſ. Fowk, Styles, fol. 416.

If there be two joint Merchants or Partners, and one of them accepts a Bill of Exchange, the ſame ſhall bind the other; and an Action of the Caſe on the Cuſtom may be maintained againſt him.

Salk. 126.

XXX. Merchants generally allow three days after a Bill becomes due for the payment; and for non-payment within three days proteſt is made, but is not ſent away till the next Poſt after the time of payment is expired.

London.

If *Saturday* is the third day, no proteſt is made till *Munday*.

Holland.

XXXI. The uſe of the Proteſt is this, That it ſignifies to the Drawer that the Party upon whom he drew his Bill was unwilling, not to be found, or inſolvent, and to let him have a timely notice of the ſame, and to enable the Party to recover againſt the Drawer, for if one draws a Bill from *France* upon a Perſon in *England*, who accepts and fails, or becomes inſolvent at the time of payment, if there be not a Proteſt and

There are two Proteſts: 1. For non-acceptance, which is called Intimation 2. For non-payment.

* timely

* Which is looked upon to be the third day.

* timely notice ſent to the Drawer there, it will be difficult to recover the Money.

In *Holland* they are not altogether ſo ſtrict, yet there muſt be a reaſonable time of notice; the reaſon is, for perhaps if he had reaſonable and timely notice, the Drawer then might have had effects, or other means of his upon whom he drew, to reimburſe himſelf the Bill, which ſince for want of timely notice he hath remitted or loſt. And the general Rule is, That though the Drawer is bound to the Deliverer till the Bill is ſatisfied, yet it is with this Proviſo, that Proteſt be made in due time, and a lawful and an ingenious diligence uſed for the obtaining payment of the Monies; for it were unreaſonable the Drawer ſhould ſuffer through his neglect.

There is no danger, be the Party never ſo reſponſible, to proteſt immediately if the money be not paid when it is due, *i. e.* the third day, but there may (eſpecially beyond Seas) be great hazard for want of proteſting.

In leg. pro debito in fine C. de bon. author. Judi. poſſiden.

XXXII. Where a Merchant hath accepted, and before the ſame became due, he becomes inſolvent, or at leaſt his Credit publickly blaſted, a Proteſt ought to go; but then there is uſually a demand made, which once coming, the Drawer, is compellable to give better Security; and if a ſecond Bill comes, if no Proteſt, then Drawer and Security lie at ſtake.

If a Bill of Exchange be paid before it is due unto one that breaketh afterwards, he ſhall be compelled to pay it again unto the Deliverer of the Money, within what time it is payable.

Brunettie's caſe

XXXIII. If a Merchant draws a Bill, and there is a Proteſt for non-payment; if another Perſon hearing of the ſame, declare, that he for the honour of the Drawer will pay the contents, and thereupon ſubſcribes, he is obliged thereby; and in this caſe it has been practiſed, that that Party that received the Money hath put his Name on the back-ſide of the Bill in blank; but the Receipt is ſometimes taken on the Proteſt, which together with the whole proceeding is turned into an Act, and the ſame being drawn by the Notary, is remitted to the Drawer by him who gave honour to the Bill.

XXXIV.

XXXIV. If a Bill be accepted, and the Party dies, yet there muſt be a demand made of his Executors or Adminiſtrators; and in default or delay of payment, a Proteſt muſt be made: And although it may fall out, that the Monies may become due before there can be Adminiſtrators, or the Probate of the Will be granted; yet that is delay ſufficient for a Proteſt in caſe of non-payment.

Fourteen days allowed from the death before Adminiſtration can be commited, unleſs there be a Will.

But on the other hand, if the Party be dead to whom the Monies are made payable, and the Monies are ready to be paid, and there is no Perſon that can legally give a Diſcharge, yet a Proteſt ought not to go for not payment; The reaſon is, becauſe there is no perſon that hath any Authority either in Deed or in Law to make it, and a Notary ought not to make it; if he does, and the Party hath received any prejudice thereby, an Action of the Caſe perhaps may lie againſt him for his pains: Nor does it avail, that if Security be offered to ſave him harmleſs againſt the Executors or Adminiſtrators, for that is an Act left to his own Diſcretion; for perhaps the Security may not be lik'd: But whether good or bad, makes nothing as to oblige him in Law.

But an Intimation ought to go, and that the Acceptor is willing to pay according to Order.

But if a Man is bound in a Bond to pay a ſum of Money to *J. S.* his Executors, Adminiſtrators, *&c.* and the Obligee dies inteſtate the day before the ſum becomes due, yet the Bond is not forfeited if not paid at the day, becauſe there was no body to whom the Obligor could pay to ſave his Obligation: But as *Littleton* ſays, *If it be to pay to* J. S. *generally, you muſt hunt him out all over the Kingdom, if you'll ſave the Penalty.*

XXXV. A Man not found, or being found, not met withal either at home or the *Exchange*, is cauſe ſufficient for a Proteſt; but in that there muſt be diligence uſed in the finding him.

A Bill returned proteſted for non-payment being once ſatisfied by the Drawer to the Deliverer, the Drawer is diſcharged, and ſo is the Acceptor to him to whom the Monies were to be paid: But the Acceptor, by virtue of his acceptance, makes him Debtor *according to the Cuſtom of Merchants* to the Drawer.

XXXVI. Monies may be had on Exchange by way of

of Letters of Credit, the which are in two reſpects; the firſt general; the other ſpecial.

The general Letter is open, directed, *To all Merchants and others that ſhall furniſh my Servant or Factor, or any other with ſuch and ſuch Monies*; for repayment of which he binds himſelf to anſwer and pay all ſuch Bills of Exchange as ſhall be drawn on him upon the receipt of the value, by his Servant, Factor, or other Perſon: If there be really Monies advanced on this Letter of Credit, and paid to the Factor, Servant or other, and Bills of Exchange are ſent to the Party that ſent ſuch Letter of Credit, and if he refuſes to accept, yet according to the cuſtom of Merchants he is bound to pay: The reaſon is, for that there was no reſpect had to the Ability of the taker up, but to him that gave his Letters of Credit: And therefore in ſuch caſe if an Action at Law be brought, the particular cuſtom as to that point muſt be carefully ſet forth.

The ſpecial Letters of Credit, where one writes a Letter to furniſh another Mans Factor or Agent; there is in this the ſame remedy as above.

As Bills of Exchange ſeldom come without Letters of Advice, ſo ought they to be purſued: If a Bill ſhall expreſs, *And put it to the Account of A*; and the Letter of Advice ſays *B*; this muſt be proteſted againſt, for it cannot ſafely be paid, at leaſt running the riſque of an equitable Suit.

XXXVII. If one pays Money on a Bill before it be due, and the Party breaks, it has been conceived that the Party ought to anſwer the Drawer: The reaſon hath been, becauſe the Drawer might have countermanded the ſame, or ordered the Bill to be made payable to another.

In *Italy* if Money is paid to a Bankers Servant, and if the Maſter ſubſcribe, *Pagate com ſi dice*, this binds the Maſter as effectually as if he had ſubſcribed it with his own hands.

XXXVIII. A Bill drawn by a Merchant in *London* payable by another Perſon beyond Seas, ſuch Bills in moſt Countries are aſſignable over from Merchant to Merchant, and the laſt Perſon may ſue and recover the ſame upon an acceptance: But in *England* only the

firſt

firſt Perſon mentioned in the Bill, and to whom the Money is made payable may recover. 'Tis true, ſuch Perſon to whom the Money is made payable may for valuable conſideration deliver this Bill to another Perſon, and he may endorſe an Order on the back-ſide; and if the Party afterwards refuſes payment of the ſame, it may be ſued in the Parties Name to whom the ſame was transferred, laying the ſame by way of Cuſtom.

It is enacted by 3, 4 *A. c.* 9. That all Notes payable to any Perſon or Order ſhall be aſſignable over in the ſame manner as Inland Bills of Exchange are or may be, and that any Perſon to whom ſuch Note is endorſed, may maintain an Action for the Money, either againſt the Perſon who ſigned ſuch Note or againſt any of the Perſons, who endorſed the ſame, in like manner as in Caſes of Inland Bills of Exchange.

XXXIX. In an Action on the Caſe grounded upon the Cuſtom of Merchants, that whenever any ſuch or other Perſon negotiating for them, with any other Merchant in *England* have Bills directed to them, that if He to whom ſuch Bills are directed refuſe to accept on ſight, or to pay ſuch Bills, then he that drew it ought, both being by the Cuſtom to be Merchants, the Bearer as well as the Drawer. And the Plantiff not having ſhewed that the Bearer was ſuch a Merchant or Perſon negotiating, it was moved to ſtay Judgment for that Cauſe; but Judgment was given for the Plantiff, for by the Court ſuch Merchant, is referred only to him, to whom the Bill is directed, and to the Procurers of ſuch a Bill, and not to the Drawers, or they to whoſe uſe the Money is to be paid, *Edgar verſ. Chute.* 1. *Keeble.* 592, 636.

See where an Averment is neceſſary of the Defendant's being a Merchant on ſuch Action upon the Cuſtom of Merchants, 2 *Cro.* 306. *Caſe verſ. Taylor.* and 1 *Cro.* 301. *Reginal verſ. Rigalt.*

In an Action on the Caſe on an Inland Bill of Exchange brought by the Endorſer againſt the Drawer it was objected, that there was no Averment of the Defendant's being a Merchant; but it was anſwered and reſolved by the Court, that the Drawing of the Bill was a ſufficient Merchandizing and negotiating to this purpoſe. *Salk* 125.

C H.

CHAP. XI.

Of Monies advanced by way of Bottomery, or Fœnus Nauticum.

I. *How* Commerce *is made equivalent to natural Community.*
II. *Whether Money be fit only to maintain the Trade and Credit of Vice.*
III. *Whether* Abraham *choſe to acquire a Property by Money.*
IV. *Of the natural and Inſtrumental meaſure of the value of things.*
V. *How Money is equal to all things.*
VI. *Money is for buying, and hinders not, but helps Permutation.*
VII. Money *the Inſtrument of Charity and Sacrifices as well as our Neceſſities.*
VIII. *Of the difference between Monies advanced to be uſed in Commerce at Land, and that which is advanced at Sea.*
IX. *Of Monies advanced by way of* Bottomery *when the Contract hath its inception.*
X. *Of Monies ſent on Shipboard, and the Veſſel is wreck'd, where the Lender ſhall bear ſhare of the loſs, and where not.*
XI. *Of Monies taken up by the Maſter, where the ſame ſhall oblige the Owners, and where not.*
XII. *The derivation and inſtitution of this ſort of Loan, and for what cauſes.*
XIII. *Of the ſeveral ways of taking up of Monies by way of* Bottomery, *real and feigned*
XIV. *Monies ſo advanced, whether gain ought to be bounded, or otherwiſe left to the will of the Lender.*
XV. *Of* Uſura Marina, *how reaſonable the ſame ſtands at this day.*
XVI. *Of Monies advanced to a conſiderable profit called* Uſufruit, *being both honeſt and honourable.*

I. MOney is one of thoſe things which they who want, want all other things but words to reproach their bad Fortune. But ſometimes it is policy even of Rags and Poverty it ſelf to undervalue that which it cannot have, and to convert that which it hath (though never ſo mean) into an eſteem; and then to lodge as much pride in a Tub, as *Alexander* could in a Palace, though it could not tempt him to a change of condition.

Nil habet infœlix paupertas durius in ſe,
Quàm quod ridiculos homines facit ——

No

No wonder therefore, ſeeing Rich Men will be obſtinate to hold their advantages, that deformed Poverty, (which mixes with them in the ſame frame as a ſhadow to ſet off their colours the better) would have the Rich to deſcend to them; and that inſtead of ſetting out Monies by way of *Bottomery*, *Uſury*, and the like, they would not have any ſuch thing as Money at all, but would have all things reduced into a ſtate, as is before mentioned.* ** Lib. 1 cap. 1. §. 1, 2, 3.*

It cannot be denied, but that we all live by the natural or intrinſick value of things; but the way to come by them is by an Inſtrument of civil value, which is Money; inſtead of Community therefore we now have Commerce: Which *Commercium* is nothing elſe but *Communio mercium*; but Communion muſt needs be by the means of another thing that may bear equal proportion on both ſides, which is Money only. But now let us hear, and if poſſible, ſatisfie the Complaints that are made againſt it ſo impatiently.

Where there is great Luxury, there muſt be likewiſe great Induſtry to maintain it; and therefore the Induſtry of this Civil State muſt be greater than that which is in the ſimple State of Nature: But what is there here to blame, ſeeing Induſtry, no more than Plenty, is in it ſelf a Sin? *Aſcham de Nat. Monet. cap. 6.*

II. It is the Anſwer of Envy or Ignorance, *Prima peregrinos obſcœna pecunia mores--intulit*---Money is that (ſay they) which maintains the Trade and Credit of Vice, if that were taken away, we ſhould look after nothing but neceſſaries which are vertuous; it makes too nice inequalities and diſtances, and is not ſignificant enough in the beſt things: For all the Money in the World is not really worth one penny Loaf, which is convertible into our Natures and Subſtances; it ſerves only to aſſure Fortune, but not Vertue; it is accepted as the meaſure of all things Natural, Moral, and Divine: For Honour is nothing but ancient Riches †, and in Morals, *Virtus poſt nummos*; this in Religion breeds that root of all Evil, Covetouſneſs: For in a ſimple ſtate of Nature neceſſary things muſt needs be ſpent within a ſhort time, and the return of the Sun brings a new Supply and a Treaſure greater than the *Indies*; *† Ariſt. Polit.*

of

* *Campanella Monarch. Hiſp.*

of which One* makes this Obſervation, *That it was got in Blood, ſails home in a Sea of Blood, and never reſts till it be laid out in Blood.* This was that which was made the price of *Salvation*, even of the Blood of our *Bleſſed Saviour*, thirty Pieces for that which was worth Thirty thouſand Worlds; but in the Religion of the firſt Times, *Nullo violatus Jupiter auro*, as *Juvenal* hath it.

And if this had not been brought into the World, we ſhould not have ſo much to diſcount for at the day of Judgment. Why therefore ſhould that which is condemned to the obſcurity of the Earth, and lodged ſo near Hell, now be made the price of all that which is above the Earth, even *à Solo uſque ad Cœlum*? Or why ſhould we be excluded from the Gifts of Nature, unleſs we have thoſe of Fortune? Is it not then more reaſonable that rich Men loſe this Inſtrument of Luxury, than the Poor ſhould loſe the neceſſary means of their Subſiſtence? This is the Plea which is made *in forma Pauperis, & de ipſa Paupertate.*

Moſt certain it is, that neither the ſtupid ſimplicity of the Woods, nor Poverty it ſelf are any part of Virtue; and therefore are not reckoned Bleſſings, as Riches were to *Solomon*, (he who built God's firſt Temple, and put his Religion in luſtre) and as they likewiſe were to *Numa*, from whom Money was called *Nummus*; He likewiſe built the firſt Temple at *Rome*, and kindled firſt the Veſtal fire, *& ferocem populum deorum metu mitigavit.*

III. We know how God converſed with *Abraham*, who was the firſt that had Money, and made uſe of it to buy a Property: It is true, they with whom he inhabited called him a Prince; but that was no Argument to him to diſown their Properties, but for the contrary, leſt they ſhould think that Dominion or a Right to things was founded in Grace.

IV. But to come more cloſe to the Queſtion, and to examine the reaſon and neceſſity of this meaſure; Money is like a Law or Government, which are all conſtituted by the ſame extreme neceſſity; therefore the counterfeiting or attempting to deſtroy any of theſe by private means, is every where Treaſon. Now this meaſure is two-fold, either Natural or Civil, or rather

Natural

Natural, and the Inſtrument which expreſſes, the natural by equal Permutation: The natural meaſure is proportioned either by *Want*, or *Plenty*. In *Want* we conſider whether the thing be uſeful or neceſſary; things which are neceſſary are beſt, but of leaſt price; as a Loaf of Bread is more neceſſary, but infinitely cheaper than a Diamond. One Man hath Clothes, another Leather; thoſe two poſſibly have no need one of another, and therefore there will be no Permutation betwixt them; but if one had need of another, then he who were more preſt would come to the price of the other: And therefore *Want* or *Plenty* is the meaſure of eſtimating things, and is the Bond of Society, whereby one Man ſhews he is or may be uſeful to another; and Nature hath ſo ordered it, that no Man is ſo rich who hath not ſome need of the Poor; and no Man is ſo mean and abject, but he may be ſome ways uſeful to the Rich.

V. The Civil meaſure, or rather Inſtrument, whereby the Natural expreſſes it ſelf, is *Money*, which hath but a feigned value, and therefore it is ſometimes higher and lower in eſteem as Men pleaſe; which could not be, if its value were natural which is unalterable. If I have Cloth at ſuch a price, and you have Wines at the ſame price, then we regarding the ſame price, may make an equal Permutation: Or if I give to you ſo many pieces of Gold for your Cloth at the ſame price, the ſale is equal again; whether it be an inconvenience that in ſome Countries * it is ſometimes at a higher value than at another, is not a conſideration of this Diſcourſe; for the price of things themſelves change more than any Money doth daily.

Money is like the middle term of a Syllogiſm, of which it is ſaid, *Quæ conveniunt in tercie conveniunt inter ſe.*

* *Poland*, and generally in moſt of thoſe Northern Countries.

VI. *Money* is an invention only for the more expedite permutation of things; but it doth not follow that Men may not make any permutations but by Money, even as well now as if we were in our natural ſtate; if they who dig now in waſte Hills have their Harveſt of Beans well gathered in, but had need of Wine for the Stomachs ſake, or of Drugs for Healths ſake; if the Vintner, or Apothecary have no need of Beans, what uſe will they make of the natural value of their Beans without Money? Or if need be, what would they do till their Beans are gathered? Money therefore

therefore hinders not Permutation and Commerce of natural things, but aſſiſt them; nay it is therefore an Inſtrument of Inſtruments; for he who hath Money may buy things which he need not uſe, but ſell, thereby to get other things afterwards for his uſe. There is no Nation or People ſo barbarous, but have Money or a publick Inſtrument of Permutation either in Metals or in Fiſh bones, &c. for it imports not much of what matter it is, provided it be durable, not counterfeitable, and difficult to come by.

VII. Take away this fungible Inſtrument from the ſervice of our neceſſities, and how ſhall we exerciſe our Charity, which is a branch of Religion and Juſtice, as well as of Humanity? He who goes to Church paſſeth as it were through two Temples, the Poor at the Porch, and the Temple it ſelf: And the giving at the Porch is called Sacrifice, Offering, and Gift, as well as that at the Altar. God would be Sacrificed to only in one Town of the World, *Jeruſalem*: But could that have been, if *Money* and *Money-changers* had not been allowed? How could they who came from ſuch remote places have by any other means brought their Oxen, Calves, Goats and Doves to the Altar? If there were nothing further to ſhew, but that one piece which our Saviour himſelf Coyned miraculouſly in the mouth of a Fiſh, it were Argument ſufficient that the uſe of *Money* may be both good, juſt, and neceſſary.

Vide Chap. of Exchange. §. 1.

VIII. Things being thus ſtated, and that *Money* is both good, juſt, and neceſſary, it will be demanded loudly, That admitting a reaſonable advantage may be made by way of Uſury, *quo jure* is it that an advantage upon the ſame more than what the Law allows, is taken?

The diſtinction is great between Monies lent to be uſed in Commerce at Land, and that which is advanced to Sea. In the firſt, the Laws of the Realm have ſet marks to govern the ſame, whereby the avaricious mind is limited to a reaſonable profit: The reaſon of that is becauſe the Lender runs none, but the Borrower all the hazard whatever that *Money* brings forth. But *Money* lent to Sea, or that which is

Leg. 3. *D. de Naut. fœn. Ibid.* 1. *eod l.* 62. *D. de rei. Vindic. Lecinius. lib.* 2. *cap.* 4. §. 2.

is called *Pecunia* * *trajectitia*, there the ſame is advanced on the hazard of the Lender, to carry (as is ſuppoſed) over Sea; ſo that if the Ship periſhes, or a ſpoliation of all happens, the Lender ſhares in the Loſs without any Hopes of ever receiving his *Monies*; and therefore is called ſometimes *Uſura Marina*, as well as *Fœnus Nauticum*, the advantage accruing to the Owners from their Money, ariſing not from the Loan, but from the hazard which the Lender runs; the which is commonly reduced to a time certain, or one or more Voyages, according to their ſeveral and reſpective agreements.

* *Leg. Fœ. Naut. Leg. periculi eod. Lex Merca.* 122.

IX. If the Bonds be ſealed, and the *Money* is advanced, if the Ship happens to miſcarry by Storm, Fire, Enemy, or any otherwiſe before the Voyage begun, then the Borrower runs the riſque, unleſs it be otherwiſe provided generally, as that if ſuch a Ship ſhall not arrive at ſuch a place at ſuch a time, &c. there the Contract hath its inception from the ſealing; but if the Condition be, That if ſuch a Ship ſhall ſail from *London* to *Amſterdam*, and ſhall not arrive there, &c. then, &c. there the contingency begins not till the departure. Yet it has been conceived, That if the Maſter takes up Money accordingly and buys in a lawful Lading, but will happen to endeavour to defraud the Prince or State of their Cuſtoms, and put ſuch Goods on Board, by means whereof he has incurred a Forfeiture of his Ship; in ſuch Caſe the Lender is not obliged to ſuch hazard.

Vide paſſim ad leg. de Fœr. Naut & D D. leg. Naval. Rhod.

Vide leg. 5. C. de Fœn. Naut.

X. If *Money* be lent on Ship-board by a Merchant *Super Cargo* or Paſſenger, and before the day of payment the Ship happens to be wreckt or caſt away; if there be ſuch a Saver as will admit a Contribution, then the Party is not to have his whole *Money*, but is to come into the Averidge: But if the time of payment were paſt before the Miſfortune happened, then the Lender muſt be repaid his whole Money free from Contribution.

Leg. Naval. Artic. 17.

And therefore by the Laws Marine, if the Borrower detains any ſuch lent Monies beyond the term appointed for the repaying, he ſhall at his Return not

Artic. 18.

only pay the profit agreed on before the Voyage, but alſo augment the ſame according to the time that hath accrued ſince the day of payment.

XI. A Maſter of a Ship hath no power to take up *Money* by *Bottomery*, in places where his Owner or Owners dwell, unleſs it were for ſo much only as his part comes to in the ſaid Ship: Otherwiſe he * and his Eſtate muſt ſtand liable to anſwer the ſame. (*a*) But when a Maſter is out of the Country, and where he hath no Owners, nor any Goods of theirs nor of his own, and cannot find means to take up by Exchange or otherwiſe, and that for want of *Money* the Voyage might be retarded or overthrown, *Monies* may be taken up upon *Bottomery*, and all the Owners are liable thereunto; otherwiſe he ſhall bear the loſs, that is, the Owners are liable by their Veſſel, though the *Money* is not ſo imployed in truth; and the Owners have their remedy againſt him whom they put in truſt. (*b*) But the Perſons of the Owners are no ways made liable by the act of the Maſter for *Monies* taken up.

* *Teſtatur Vinius in Peckium ad L. L. Nautic. quem vide pag.* 95. *Leg. Oleronc.* 1. *Leg.* 4. *D. de Naut. fœn. l.* 1 *C. eod. Leg. qui Roma §. Calimachus de verb. obl. & ibi* Gothfr. & *alios.*

(*a*) *Hob.* 12. *Mo* 918. *Noy* 95. *Latch.* 252. *Salk.* 34. *Lex Merc.* 102. 122

(*b*) *Salk* 35. 2 *Mod. Caſe.* 79.

If Owners agree not in ſetting out the Ship, moſt Voices ſhall carry it, and then *Money* may be taken up for their part by *Bottomery*, or *Fœnus Nauticum*, or by *Hypothecating* ſuch a proportion of the Ship.

Many Maſters of Ships having Enſured or taken up *Monies* upon *Bottomery* to greater Sums of Money than the value of their Adventure, do willfully caſt away, burn, or otherwiſe deſtroy the Ships under their charge, the ſame was made Felony, and the Perſon and Perſons ſo willfully doing or procuring the ſame to be done, were to ſuffer Death.

16 *Car.* 2 *cap.* 6. §. 12. A good Law, and ought to be encouraged; it's pity it was not continued

XII. The Signification of this *Fœnus Nauticum*, is by the *Dutch* called *Bomerie*, *Bodmerie*, *Boddemerii*, ſo variouſly pronounced from the Keel * or Bottom of the Ship upon the Parallel, whereof the Rudder of a Ship doth govern and direct the ſame; *parte pro toto ſumpta, ita primum appellata, cum etiam lingua Gallorum antiqua & Britannica Bodo vel Bodun fundum aut profundum ſignet* † *in quem navis fundum, vel ipſam navem ejuſq; uſum mutuo accepta eſt pecunia, ſed poſtea latius pro fœnore nautice etiam uſurpari cœpit.* And the Money

* *Joh. Locin. lib.* 2. *c.* 4. § 1. *Latche's* Rep. *fol.* 252. *Scarborough's* Caſe

† *Teſte Cambdeno in Britannia, p. m.* 149. *Locinius lib.* 2. *cap.* 4. §. 1.

ſo taken up by the Maſter is done upon great extremity, and that for the compleating of the Voyage when they are in diſtreſs and want in ſome Foreign parts; and indeed ſuch taking up is indeed in the nature of Mortgaging the Ship, for *le Neif oblige al payment de ceo &c.* And in the Inſtrument there is a Clauſe that expreſſes that the Ship is engaged for the performance of the ſame.

Monies that are advanced are upon two Securities, the one is on the bare Ship, the other upon the Perſon of the Borrower, ſometimes upon both; The firſt is where a Man takes up Monies and obliges himſelf, that if ſuch a Ship ſhall arrive at ſuch a Port, then to repay (perhaps) double the ſum lent; but if the Ship happens to miſcarry, then nothing.

This Money is likewiſe called *pecunia trajectitia*, becauſe that upon the Lenders Danger or Adventure, it is carried beyond or over the Seas, ſo that if the Ship periſh or all be ſpoiled, the Lender does loſe his whole Money Lent: But on the contrary, Money Lent at Intereſt, is delivered at the Peril of the Borrower, and the profit of this is meerly the price of the ſimple Loan, and is called *Uſura.* But the profit of the other, is a Reward for the Danger and Adventure of the Sea, which the Lender takes upon him during the Loan, which is to be underſtood until the Voyage be ended. *Lex Mercat.* 122. Sea Law, 206, 207. Difference between this and other Loans as Intereſt.

The forms of Bills of *Bottomery*, Laws of the Sea, 580, to 584. Appendix to the ſame 13, 14, 15. *Bills of Bottomery.*

XIII. So likewiſe ſome will take up Monies, the condition reciting, *Whereas there is ſuch a Ship*, naming her, *bound to* Amſterdam, *whereof ſuch a Man is Maſter*, (whereas indeed there is no ſuch Ship or Maſter in nature) *that if that Ship ſhall not arrive at ſuch a place within twelve months, the Money agreed on to be paid, ſhall be paid; but if the Ship ſhall arrive, then nothing.* The firſt of theſe is honourable and juſt according to the laudable practice among Marine Perſons, and though the advantage runs high, as 20, 30, nay ſometimes 40 *per Cent.* without conſideration of time; (for the Monies are to be paid within ſo many days after the Ship's ſafe arrival;) *Toto tit. dig. & Cod. de Naut. fœn & Doctorum ſic Hardus*

In tit. Cod. de Naut. fœn. n.

arrival;) yet in regard the Adventure is born by the Lender, for (if the Ship periſhes, the Advancer loſes,) the Laws and Practice of all Maritime Countries allow of the ſame. And therefore by the *Common Law*, if an Action of Debt be brought on ſuch an Inſtrument, the Defendant cannot plead the *Statute* of *Uſury*. And ſo it was adjudged where one *Sharpley* had brought an Action of Debt on a Bond for Monies taken up upon *Bottomery*: The Defendant pleads the *Statute* of *Uſury*, and ſhewed that a certain Ship called the   made a Voyage to fiſh in *New found-land*, (which Voyage might be performed in eight Months) and the Plantiff delivered 50 *l.* to the Defendant to pay 60 *l.* at the return of the Ship to *D.* and if the ſaid Ship by Leakage or Tempeſt ſhould not return from *New-found-land* to *D.* then the Defendant ſhould pay the principal Money; and if the Ship never returned, then nothing to be paid. Upon * Demurrer it was adjudged the ſame was not Uſury: For if the Ship had ſtaid at *New-found-land* two or three years, yet at her return but 60 *l.* was to be paid, and if ſhe never returned, then nothing.

Trajectitia pecunia propter periculum creditoris quamdiu navigat navis infinitas uſuras capare poteſt; upon which Law it was obſerved by *Anianus*, *Quia maris periculo committitur quantas convenerit uſuras hanc pecuniam dare creditor poteſt.*

Verum enimvero hic proprie non verſari, damnatum fœnus, ſed compenſationem aliquam periculi, quod creditor contra naturam mutui in ſe recepit partem. Johanes Locinius, lib. 2. *cap.* 4. §. 1, & 2.

* Trin. 6. Jac. in B. R. 2 Cro. 208. *Sharpley* verſus *Harroll.* 1 Levins 54. *Sayer* & *Gleane*, & 1 *Sid.* 27. Cro. Jac. 508. 1 Keb. 711.

The other advance which is upon a fictitious ſuppoſition of a Ship and Maſter, wherein indeed there is no ſuch in nature, is more unconſcionable, the ſame being the common practice that's uſed amongſt the *Italians*, and now on this ſide the Water, though the ſame is as to internal Right unjuſt, yet it is daily practiſed, and it was not long ſince adjudged † that ſuch Contract was good, according to the *Common Law* of this Realm, and that on a ſpecial Verdict.

† *C. B. Hill.* 22, 23 *Car.* 2.

XIV. Moſt certain it is that the greater the danger is, if there be a real Adventure, the greater may the profit be of the Monies advanced: And ſo hath the ſame been the Opinion of Civilians, and likewiſe [illegible] ſome

ſome Divines; though ſome ſeem to be of opinion, That any profit or advantage ought not to be made of Monies ſo lent, no more than of thoſe that are advanced on ſimple loan, and on the peril of the borrower. However, all or moſt of the Trading Nations of Chriſtendom do at this day allow of the ſame, as a matter moſt reaſonable, by reaſon of the contingency or hazard that the Lender runs; and therefore ſuch Monies may be advanced ſeveral ways, and a profit may ariſe ſo, that there runs a peril on the Lender.

Vide Carolum Molinæum *de uſur. q.* 3. *n.* 92. *ait hoc approbat, omnes Theologi ut creditor poſſit aquid accipere ultra ſorbem pro ſuſceptione periculi.* But ſurely that muſt be upon a real venture. Cl. Salmaſius, *cap.* 9. *de modo uſur. fo'*, 380, 188, 218. *Trajectitia pecunia propter periculum creditoris, quamdiu navigat navis, infinitas uſuras capere poteſt.* Upon which place *Anianus* obſerves, *Quia maris periculo committitur in quantas convenerit uſuras hanc pecuniam dare creditor poteſt. Vide Novel. Conſt.* 106. 110.

There is likewiſe a ſecond way of advancing Monies called *Uſura Marina*, joining the advanced Monies and the danger of the Sea together; and this is obliging ſometimes upon the Borrower's Ship, Goods and Perſon: The product of which by agreement will advance ſometime 20, 30, and ſometimes 40 *per Cent.* As for inſtance, A private Gentleman has 1000 *l.* ready Money lying by him, and he has notice of an ingenious Merchant that has good Credit beyond Seas, and underſtands his Buſineſs fully, applies himſelf to him, and offers him a 1000 *l.* to be laid out in ſuch Commodities as the Merchant ſhall think convenient for that Port or Country the Borrower deſigns for, and that he will bear the Adventure of that Money during all that Voyage; (which he knows may be accompliſhed within a year) hereupon the Contract is agreed upon, 6 *per Cent.* is accounted for the Intereſt, and 12 *per Cent.* for the Adventure outwards, and 12 *per Cent.* for the Goods homeward; ſo that upon the return the Lender receives 30 *per Cent.* which amounts to 1300 *l.* The Lender in this caſe hath a good bargain, no queſtion. Now let us ſee what advantage the Borrower hath.

Uſura legitima ejus qui trajectitiam pecuniam trans mare vehendam fœneratur, id eſt cum periculo ſuo, centeſima eſt.

1. The Borrower prevents the taking up the like Sum at Intereſt, which comes to 6 *per Cent.* and Brokage, which comes now in this Age, through the

generoſity of the Merchant, and coveteouſneſs of the Scrivener, at 1 or 2 *per Cent.* more; and then the ſame is let out but for ſix Months, and then the Scrivener inevitably at the ſix Months end ſends his Note, that his Friend expects his Monies to be paid in; ſo that to ſtop that gap there muſt be Continuation, which is at leaſt one *per Cent.* more, beſides the obliging of Friends in Securities.

2. The *Aſſurance* is prevented, which perhaps may come to between 5 and 20 *per Cent.* according as the Times are; and common prudence will never ſuffer a Merchant to venture two parts of three parts of his Eſtate in one Bottom without aſſuring.

3. As he ſhall not have occaſion to Enſure, ſo it may be a great occaſion of preventing the common Obligation of his Enſuring of others: The which in a generous Merchant in Honour cannot be denied the *Premio* running reaſonable.

4. It prevents the Parties running the Riſque and danger of the Seas, Enemies, or any other fatal loſs, and hath been a means to introduce a Man's Credit in a ſhort time at a leſſer charge, if not to put him in a condition not to be beholden to ſuch a fair, though chargeable means.

And this cannot be *Uſury* by the Laws of this Realm, for the Riſque and Danger that the Lender runs.

In the *Eaſt-India*, and ſome other Companies.

XV. There is alſo another way, but that is both honeſt and honourable, called *Uſufruit*, that is a Stock in a Company or Society which is perpetual; ſuch a Stock or Portion may be purchaſed, that is, the advantage or benefit ariſing by the improvement of the ſame.

As for inſtance, The *Eaſt-India* Company hath a *Stock* lodged in their hands by divers Perſons, which they in the moſt prudent manner as they ſee fit, imploy to ſuch places as they judge moſt proper; if a Return is made, the advantage of that is diſtributed to each Perſon that is any way intitled to that *Stock*: Which

Which advantage is called a *Dividend*, and perhaps may afford ſome 20 or 30 *per Cent*. But on the other hand, if that proportion of the Stock which goes out happens to miſcarry, the abatement is proportionable, and ſo the Stock may be leſſened, unleſs that they will ſtay the *Dividends* to keep up the Stock; the which they may do; *For it is a Truſt repoſed of ſo many Mens Monies in their Hands, to yield them ſuch Advantage as they ſhall upon a juſt account ſet out:* So that if a Man hath 1000 *l.* Stock, he cannot take the ſame out of the Great Stock whereby to leſſen the ſame, but he may transfer that *uſufruit* by that Cuſtomary way which they have to any other Perſon, for a valuable conſideration in *infinitum*. Such a Stock of 1000 *l* in the *Eaſt-India* Company in time of War might have been purchaſed for 80 *l. Nett*; but now in time of Peace ſcarce got under 170, or 180 *l.* the Dividends running high.

CHAP. XII.

Of Impoſitions called Great Cuſtoms, Petty Cuſtoms, and Subſidies.

I. Impoſitions, *whether they may be commanded without the Three Eſtates, and of* Magna Charta *touching the ſame.*

II. *Of* Impoſitions *made voluntary by conſent of Merchants, and of the adnul of the ſame.*

III. *Of the Confirmation of the Great Charter for free Traffick; and of the Settlement now made on His Majeſty of the ſame.*

IV. *Of the Immunities formerly of the* Hanſiatick *Towns here in* England, *and when determined.*

V. *Of the Antiquity of Cuſtomers or Publicans as well in former Ages as at this preſent time, in moſt Nations.*

VI. *Of the Impoſition called* Magna Cuſtuma.

VII. *Of that which is called* Parva Cuſtuma *payable by Strangers, and the* Act *called commonly* Charta Mercatoria.

VIII. *Of Subſidy, and of what, and the Rates how ſet.*

IX. *Of Subſidy by Strangers on Wines.*

X. *Of Goods not rated how to pay.*

XI. *Of the Subſidy Duty for Clothes.*

I. THat *Impoſitions* neither in the time of War or other the greateſt neceſſity or occaſion that may be (much leſs in the time of Peace) neither upon

upon Foreign nor inland Commodities of what nature ſoever, be they never ſo ſuperfluous or unneceſſary, neither upon Merchants, Strangers, nor Denizens, may be laid by the King's abſolute Power without Aſſent of Parliament, be it never ſo ſhort a time.

By the Statute of *Magna Charta*, *Chap.* 30. the words are, *All Merchants, if they were not openly prohibited before, ſhall have their ſafe and ſure Conducts, to enter and depart, to go and tarry in the Realm, as well by Land as by Water, to buy and ſell without any Evil Tolls, by the Old and Rightful Cuſtoms (except in time of War) and if they be of the Land making War againſt Us, and be found in our Realm at the beginning of the War, they ſhall be attached without harm of Body or Goods, until it be known to Us or Our Juſtices how Our Merchants be intreated there in the Land making War againſt Us.* The Statute of which this is a branch, is the moſt ancient Statute Law we have, won and ſealed with the Blood of our Anceſtors, and ſo reverenc d in former times, that it hath been twenty nine times ſolemnly confirmed in Parliament.

Cuſtoms, Subſidies, Tolls, Exciſes, Impoſts, and other Duties upon Commodities Imported or Exported are due to the particular Princes or States, by the general Law of Nations, as a matter Inherent to their Prerogatives, as they are the abſolute Commanders, Proprietors, and Maintainers of the Harbours, Havens, and Ports, where the Commodities are Exported or Imported: And all Merchants are Bound to take notice thereof, and obſerve the ſame, according to the Feudal Laws, Conſtitutions and Proceedings therein uſed in all Countreys reſpectively, whereby they are ſecured and defended in their Trade, and Traffick. Or otherwiſe in Breach of not obſerving ſuch Laws and Conſtitutions, they are in danger of Mulcts, Fines, Loſs and Forfeitures, of their Goods and Commodities. To give an exact account of the Nature, Antiquity, ſeveral ſorts of Cuſtoms, Subſidies, Impoſts, and other Duties relating to Merchants, would take up too large a compaſs for this Trea-

tiſe,

tiſe, therefore ſhall refer as to the nature of them to the ſeveral Books of my Lord *Cook*, in his 2 *Inſtit.* upon the *Stat.* of *Magna Charta*, *Cap.* 30. And other Statutes and Books which are many on this Subject.

II. *Impoſitions* were in ſome ſort done *Conſenſu Mercatorum*, by *Edward* the Firſt, and *Edward* the Third: And again in *Henry* the Eighth, of which the Houſe of *Burgundy* complained, as againſt the Treaty of Entercourſe. *Rot. Almaign. 3 Ed. 3 Rot. Clauſ. 29 Ed. 1. Extract. Bruxelles.*

King *Henry* the Third finding that ſuch a *Modus* of Impoſition tended to the deſtruction of Trade, and apparent overthrow of Commerce, and was againſt the Great Charter, made Proclamation *Anno* 16. in all Ports of *England*, That all Merchants might come *faciendo rectas & debitas conſuetudines, nec ſibi timeant de malis tollis*, for that ſuch Impoſitions had no better name than *Maletolts*. *Dorſ. Clauſ. m 16 Hen. 3. n. 20.*

The like was declared and done by *Edward* the Firſt in the twenty fifth year of his Reign, and *Edward* the Second, in the eleventh and twelfth years of his Reign. *Rot. Clauſ. 11 Ed. 2.*

And though the King cannot lay any Impoſition on Merchant or Merchandize without Aſſent in Parliament, yet the King by his Prerogative may reſtrain them from Trading (if not from any Chriſtian Foreign Prince) yet from any Infidel Realm, State, or People without his Royal Licence: And the reaſon of this is, for that by ſuch Commerce it might give occaſion for the relinquiſhment of the Catholick Faith, and an opportunity to adhere to Infideliſm; and therefore generally in *Edward* the Third's Time, Licenſes were frequently granted with this Preamble, That the King having ſpecial truſt and confidence that the Party would not decline from his Faith, did licenſe him, *&c.* In the ſeventh of King *James*'s time this very matter came in queſtion, upon Licenſe granted to a Merchant to Trade to the *Eaſt-Indies*. *Vide Lane's* Report in *Bate's* Caſe, this matter there debated. *Mitchelbourn* and *Mitchelbourn's* Caſe. C. B. *Brownlow's* 2. *part, fol.* 296.

III. In 2 *Ed.* 3. the Great Charter for Free Traffick was Confirmed; and about ſome three years after there were Commiſſions granted for the raiſing of a new kind of Tallage, but the People complained;

12 *Ed.* 3. *Memb.* 22. *in dorſ. Rot. Almaigne.*

ed; whereupon the Commiſſions were repealed, and he promiſed never to aſſeſs any but as in the time of his Anceſtors.

But this Prerogative Power of Impoſing inward and outward upon Commodities over and above the ancient Cuſtom of Subſidy without a free conſent in Parliament, is now ceaſed and ſettled; and that queſtion which for many Ages had been handled by the moſt Learned of their times, in the aſſerting and in the denying, will never more be remembred, the ſame being now eſtabliſh'd by Act of Parliament: Which being managed for ſome time, was afterwards farmed out. The like having been done by former Kings, as did *Edward* the Third with the * New and Old Cuſtoms of *London* for 1000 Marks monthly to be paid unto the Wardrobe.

The Parliament having juſtly, honourably and voluntarily humbly preſented ſuch and many more who are eſtabliſhed on his Majeſty according to their ſeveral limitations.

* *Clauſ. Anno.* 5 *Ed.* 3. *Orig.* 17 *Ed.* 3 *Rot.* 2.

Richard the Second, *Anno* 20. Farmed out the Subſidy of Cloth in divers Counties.

Vide the great Caſe in *Mich.* 4 *Jac.* in the Exchequer *verſus Bates. Lane's* Rep. *fol.* 22.

So *Edward* the Fourth, *Henry* the Eighth, Queen *Elizabeth*, and King *James*; the ſame having been uſed in former Ages even in the beſt governed State, *Rome*, which let out Portions and Decim's to the *Publicans*.

The Old Hanſe Towns. *viz. Lubeck*, *Collen*, *Brunſwick*, *Dantzick*, and the reſt, had extraordinary Immunities granted unto them by our Third *Henry*, for their great aſſiſtance and furniſhing him in his Wars and Naval Expeditions with ſo many Ships; and as they pretended, the King was not only to pay them for the Service of their Ships, but for the Veſſels themſelves in caſe they miſcarried: The King having concluded a Peace, and they being on their return home for *Germany*, the moſt conſiderable part of their Fleet miſcarried by ſtorm and ſtreſs of weather; for which (according to Covenant) they demanded reparation. The good King in lieu of that which he wanted, *Money*, granted them divers Immunities; and amongſt others, they were to pay

but

but 1 *per Cent.* Cuſtom, which continued till Queen *Mary*'s time, and by the Advice of King *Philip* ſhe enhanſed the 1 to 20 *per Cent.* the *Hans* not only complained, but clamoured aloud for breach of their Ancient Privileges confirmed unto them by long Preſcription from thirteen ſucceſſive Kings of *England*, and the which they pretended to have purchaſed with their Money. King *Philip* undertook to accommodate the buſineſs, but Queen *Mary* dying, and he retiring, nothing was effected. Complaints being afterwards made to Queen *Elizabeth*, ſhe anſwered, *That as ſhe would not innovate any thing, ſo ſhe would protect them ſtill in the Immunities and Condition ſhe found.* Hereupon their Navigation and Traffick was ſuſpended a while, which proved very advantageous to the *Engliſh*, for they tryed what they could do themſelves herein; their adventures and returns proving ſucceſsful, they took the whole Trade into their own hands, and ſo divided themſelves to Staplers and Merchant-adventurers; the one reſiding conſtant at one place, the other keeping their courſe, and adventuring to other Towns and States abroad with Cloth and other Manfactures. This ſo nettled the *Hans*, that they deviſed all the ways that a diſcontented People could to draw upon our new *Staplers* or *Adventurers* the ill Opinion of other Nations and States: But that proving but of too ſmall a force to ſtop the Current of ſo ſtrong a Trade as they had got footing into, they reſorted to ſome other; whereupon they applied themſelves to the Emperour, as being a Body incorporated to the Empire: And upon complaint obtained Ambaſſadors to the Queen to mediate the buſineſs: But they returned ſtill *re infecta.* Hereupon the Queen cauſed a Proclamation to be publiſhed, *That the Merchants of the* Hans *ſhould be intreated, and uſed as all other Strangers within her Dominions in point of Commerce, without any mark of diſtinction.*

This inflamed them more, whereupon they bent their Forces more eagerly, and in an Imperial Diet, at *Ratisbone* they procured that the *Engliſh* Merchants, who had aſſociated themſelves in Corporations both in

in *Embden* and other places, ſhould be adjudged *Monopoliſts*; whereupon there was a Comitial Edict procured againſt them that they ſhould be exterminated, and baniſhed out of all parts of the Empire; which was done by *Suderman* a great Civilian. There was there at that time for the Queen as nimble a Man as *Suderman*, and he had the Chancellor of *Embden* to ſecond him, yet they could not ſtop the Edict, whereby our new erected Society of Adventurers were pronounced a Monopoly: Yet *Gilpin* played his Cards ſo well, that he prevailed the *Imperial Ban* ſhould not be publiſhed till after the Diet; and that in the interim his Imperial Majeſty ſhould ſend an Ambaſſador to *England* to advertiſe the Queen of ſuch proceedings againſt her Merchants. But this made ſo little impreſſion on the Queen, that the Ban grew rather ridiculous than formidable, for the Town of *Embden* harboured our Merchants notwithſtanding, and afterwards the Town of *Stode*; but the Hanſiaticks purſuing their revenge, and they being not ſo able to protect them againſt the Imperial Ban, removed and ſettled themſelves in *Hamburgh*.

This Politick Princeſs, in recompence of their revenge, commanded another Proclamation to be publiſhed, 'That the *Hanſiatick* Merchants ſhould be 'allowed to Trade into *England* upon the ſame Con'ditions as they formerly did, provided the *Engliſh* 'Merchants might have the ſame Privileges to re'ſide and trade peaceably in *Stode* or *Hamburgh*, or 'any where elſe within the Precincts of the *Hans*. This ſo incenſed and nettled them, that all endeavours were made to cut off *Stode* and *Hamburgh* from being Members of the *Hans*, or of the Empire: But the Deſign was ſuſpended till they ſaw the ſucceſs of 88, King *Philip* having promiſed to do them ſome good Offices in the Concern.

But the Queen finding that the *Hans* were not contented with that Equality ſhe had offered to make betwixt them and her own Subjects, but were uſing ſuch extraordinary means, put forth another Proclamation, 'That they ſhould tranſport neither

'Corn,

‘ Corn, Victuals, Arms, Timber, Maſts, Cables, ‘ Metals, or any other Materials or Men to *Spain*, ‘ or *Portugal*. And not long after the Queen growing more redoubted and famous by the Overthrow of King *Philip*'s Invincible Armado, (as the Pope chriſtened it) the *Hans* began to deſpair of doing any good, eſpecially they having about ſome 60 Sail of their Ships taken about the River *Lisbon* by her Majeſties Frigats, that were laden with *Ropas de contrabanda*. She notwithſtanding had thoughts of diſcharging this Fleet by endeavouring a reconcilement of the difference: But ſhe having intelligence of an Extraordinary Aſſembly at *Lubeck*, which had purpoſely met to conſult of means to be revenged of her, ſhe thereupon made abſolute Prize of thoſe 60 Sail, only two were freed to carry home the ſad Tidings of their Brethrens misfortune. Hereupon the *Pole* ſent a ranting Ambaſſador in the behalf of the *Hans*, who ſpake of the Injuries done to the *Hans* in a high tone. But the Queen her ſelf ſuddenly anſwered him in a higher, with a ſatisfaction no greater than what ſhe had done to others of the like quality before.

This fortunate Claſhing for the 19 *per Cent*. on the Cuſtoms, has proved ever ſince advantagious for *England*, our Merchants have ever ſince beaten a peaceful and an uninterrupted Trade into *High* and *Low Germany*; and by their conſtant Trade in thoſe Parts have found a way thorow the *White Sea* to *Arch-Angel* and *Moſco*. The return of all which hath ſince vaſtly increaſed the *Riches* and *Strength of this Nation*.

V. After the *Jews* became Tributary to *Rome*, (which was acquired by *Pompey* threeſcore years before the Birth of our Savour) certain Officers or Commiſſioners were appointed by the *Romans* in all thoſe places where their Victorious Standards had claimed a Conqueſt, who uſed to appoint ſuch Officers or Commiſſioners to collect and gather up ſuch Cuſtom money or Tribute as was exacted by the Senate. Thoſe that gathered up theſe Publick payments were termed *Publicani*, *Publicans*, and by reaſon

Joſeph. locutus de Pompeio. l. 1. *de Bello Jud. c.* 5. *p.* 720.

ſon of their cruel and oppreſſive Exaction, they became hateful in all Nations.

* Sigon. de Antiq. Jur. Civ. Rom l. 2. c. 4. Luke 13. 2.

Every Province has its ſeveral Society or Company of Publicans; * every Society its diſtinct Governour: In which reſpect it is that *Zacheus* is called by the Evangeliſts, *Principes Publicanorum*, the chief Receiver of the Tribute, or chief Publican: And all the Provincial Governours in theſe ſeveral Societies had one chief Maſter or Superintendant reſiding at *Rome*, unto whom the other ſubordinate Governours gave up their Accounts. Theſe Publicans were hated of all the *Roman* Provinces, but eſpecially of the *Jews*, becauſe though it was chiefly maintained by the *Galileans*, yet it was generally inclined unto by the *Jews*. That Tribute ought not to be paid by them. This Hatred is confirmed by the Rabinnical Proverb, *Take not a Wife out of that Family wherein there is a Publican, for ſuch are all Publicans.* Yea, a faithful Publican was ſo rare at *Rome* it ſelf, that one *Sabinus*, for his honeſt managing of that Office, in an honourable remembrance thereof, had certain Images with this Inſcription, Καλῶς τελωνήσαντι *For the faithful Publican.* No marvel that in Holy Writ Publicans and Sinners go hand in hand.

If. Cauſabon, Exercit. 3. 37.

Sueton. in Flav. Veſp. cap. 1.

But now the World has been ſo long uſed to them, that in all or moſt Nations the particular Princes or States chuſe out the moſt Sage and Prudent Men for that Imployment: And certainly the Cuſtoms of this Realm never did return to that great and clear Account as they have done under the care and prudent management of the preſent Commiſſioners: And were *Tertullian* alive, he would have recanted that Opinion of his, *That none would be a Publican but a Heathen.*

Tertullian (printed 1609.) de pudic. cap. 9.

VI. Cuſtoms are Duties certain and perpetual payable to the King as the Inheritance of his Crown, for Merchandizes tranſported from and beyond the Seas from one Realm to another. *Magna Cuſtuma & antiqua* is payable out of Native Commodities, *ſcilicet*, Wooll, Wooll-fells, and Hides, and that is certainly impoſed.

And

And this Cuſtom which is called *Magna Cuſtuma*, is due to the King of common Right for four Cauſes.

1. For leave to depart the Kingdom, and to carry Commodities of the Realm out of it.

2. For the Intereſt and Dominion which the King hath in the Sea, and the Arms thereof.

3. Becauſe the King is the Guardian of all the Ports within the Realm, & *Cuſtos totius Regni*.

4. For Wharfage and Protection of Merchants upon the Seas againſt the Enemies of the Realm, and Pirates.

VII. The Cuſtom which is called *Parva Cuſtuma*, is a Cuſtom or Duty payable by Merchants, Strangers, and begun in the time of King *Edward* the firſt, when they granted him, that they would pay to him and his Heirs 3*d.* in the Pound for all Merchandizes Exported and Imported by them, &c. And that the Charter was, and may be of great Uſe, I have here inſerted the ſame, as it was faithfully tranſcribed out of the Roll in the *Tower*. *1 Eliz. Dyer, fol. 165.*

Upon an Information for not paying of Cuſtom for Linnen Cloth, the Caſe was thus: The Defendants were Born within the Realm, their Father being an Alien, but their Mother was Born here, the queſtion was, whether the Defendants ſo Born ſhould pay Aliens Cuſtom or not? Becauſe the Attorney General ſaid that Directions were lately given in *Scaccario*, that the Iſſue of Aliens for the firſt Generation, ſhould pay Aliens Duties; but here the Defendant's Mother was *Engliſh*, and the Court gave Liberty to find it ſpecially; but the Plaintiff would not inſiſt upon it, becauſe ſome part of the Goods were clearly forfeited, for not paying any Cuſtom at all, or making any offer to pay it, ſave only by Poſt-entry after Seizure, and a Month lacking 3 Days after the firſt Entry of the Quantity and Parcels at the Cuſtom-Houſe. And a Verdict paſſed for the Plaintiff for that part only, *Hardreſs.* 355, 336.

If Goods are Landed, and the Cuſtom paid at one Port, and afterwards the Goods are conveyed croſs the Land or by Sea, to another Port, Cuſtoms ſhall not be paid for them at the Second Port and that *Goods conveyed to ſeveral Ports ſhall not pay Cuſtom twice.*

Ii this

this is not within the Stat. of 3 *H.* 7. *Cap.* 7. *Brun* verſ. *Roe.* 1 *Sid.* 264.

Bancks had ſeized Cambricks and Hollands becauſe they were landed at *Dover* without paying Cuſtom; and it was afterwards agreed, that the Owner ſhould pay the Cuſtom and have his Goods again, and ſo it was done; whereupon an Information was brought againſt *Banks* for the Goods on the Statute 3 *H.* 7. 7. and he pleaded not guilty, and gave in Evidence, that the Goodswere enter'd in the Cuſtom-Houſe Book. But *per Curiam*, that was no diſcharge to him for the Miſchief; for then when Goods are forfeited, every body will redeem them by paying Cuſtom: And therefore the Goods being once forfeited ſhall be the King's without Redemption, and the Officer is not diſcharged by delivering 'em over, as in *Trover.*

Compoſitions with the Farmers for the forfeiture.

The Plaintiffs were Farmers of the King of his Cuſtoms, and the Defendants brought into Port a *Ship* with Goods and unladed, the Cuſtoms not paid: After they compounded with the King for the Forfeiture, (which the Farmers had not in their Grant) after the Farmers brought Debt againſt them for the Cuſtom of 12 *d. per* pound. The Defendants pleaded this matter in bar; and upon Demurrer Judgment *pro Quer.* for this reaſon, becauſe the 12 *d.* in the Pound became a Duty by bringing the Goods into the Haven, and a Chattel veſted. By *Tanfield*, this Cuſtom is due, when a Ship is brought within an Haven, with intent to Unlade there, but not when they are caſt over-board by Tempeſt. *Salter* and *Garraway* agaiſt *Malapert.* 1 *Rolls Rep.* 383.

Duty for Salt taken as Prize.

Salt taken from a *Spaniard* by a *Dutchman*, by Commiſſion from *Scotland*, and brought into *Scotland*, and from thence into *England*, the Duty ſhall be paid for it as *Scotch* Salt: But if it had been taken by *Engliſh* Commiſſion, and only put into *Scotland*, it ſhould pay as *Engliſh* or foreign Salt, within the meaning of the Statutes of the 12 *Car.* 2. *cap.* 18. *Sect.* 16. and 14 *Car.* 2. *cap.* 11. *Sect.* 38. ——— againſt *Jaggard.* 3 *Keeble* 510.

PRO-

Pro Mercatoribus Alienigenis de Libertatibus eis conceſſis.

REX, Archiepiſc. &c. Salutem. Circa bonum ſtatum omnium Mercatorum ſubſcriptorum Regnorum, Terrarum, & Provinciarum, videlicet, Alemann. Franciæ, Hiſpaniæ, Portugaliæ, Navarr. Lumbardiæ, Tuſciæ, Provenciæ, Cataloniæ; Ducatus noſtri. Aquitann. Tholoſan. Tatureini, Flandr. Brabant, & omnium aliarum terrarum, & locorum extraneorum quocunque nomine cenſeantur, venientium in Regnum noſtrum Angliæ, & ibidem converſantium.

Nos præcipua cura ſollicitat, qualiter ſub noſtro Dominio tranquillitatis, & plene ſecuritatis, immunitas eiſdem Mercatoribus futuris temporibus preparetur: Ut itaque vota ipſorum reddantur ad noſtra, & Regni noſtri ſervicia promptiora; ipſorum Petitiononibus favorabiliter annuentes, & pro ſtatu eorundem plenius aſſecurando, in forma que ſequitur ordinantes ſubſcripta, dictis Mercatoribus pro nobis, & heredibus noſtris in perpetuum ducimus concedenda.

For Merchant Strangers concerning Liberties granted to them.

THE KING, to his Archbiſhops, *&c.* ſendeth Greeting. Concerning the good Condition of all the Merchants of the Kingdoms, Lands, and Provinces under-written: That is to ſay, *Germany, France, Spain. Portugal, Navarr, Lombardy, Tuſcany, Provence, Catalonia*; Our Dukedoms of *Aquitain, Tholouſe, Turein, Flanders, Brabant*, and all other Lands, and Foreign Places by what Name ſoever called, coming into Our Kingdom of *England*, and there remaining. 31 *Ed. 1. num* 44. *intus.*

We being very ſolicitous out of Our ſpecial Care, that under Our Dominion, a Freedom of Tranquility, and full ſecurity for the ſaid Merchants may be provided for the future, ſo as they may the more readily apply themſelves to the Service of Us, and of our Kingdom, We graciouſly anſwering their Petitions, and ordaining more amply for ſecuring their Condition in form following under-written, are pleaſed to grant to the ſaid Merchants for us, and our Heirs for ever.

Imprimis, That is to ſay, That all Merchants of the ſaid Kingdoms and Lands, may come from any other place ſafe and ſecure under our Tuition and Protection into our ſaid Kingdom of *England*, and every where within our Dominion, with their Merchandizes of what ſort ſoever, and be unmoleſted and quiet concerning * Murage, † Pontage, and || Pavage, and that within Our ſaid Kingdom and Dominion, they may Traffick in the Cities, Boroughs, and Market-Towns, only in groſs, as well with Natives or Inhabitants of this Our Kingdom and Dominion aforeſaid, as with Strangers, Foreign and Domeſtick: But ſo, as their Wares vulgarly called Mercery, or the *SPECIES thereof*, they may ſell by Retail, as formerly hath been accuſtomed. And that all the ſaid Merchants may carry, or cauſe to be carried, whether they pleaſe, their Merchandize which they have brought into Our ſaid Kingdom and Dominion, or otherwiſe acquired, except to the Lands of the manifeſt and notorious Enemies of Our Kingdom, paying

* *Repairing publick Walls.*
† *Bridges.*
|| *Pavements.*

Imprimis, Videlicet, quod omnes Mercatoris dictorum Regnorum & Terrarum ſalvo & ſecure ſub tuitione & protectione noſtra in dictum Regnum noſtrum Angliæ, & ubique infra poteſtatem noſtram alibi veniant cum Merchandiſis ſuis quibuſcunque, de Muragio, Pontagio, & Pavagio, liberi & quieti, quodque infra idem Regnum & Poteſtatem noſtrum, in Civitatibus, Burgis, & Villis Mercatoriis poſſint mercari, duntaxat in groſſo, tam cum Indigenis ſeu Incolis ejuſdem Regni, & Poteſtatis noſtre prædicte quam cum Alienigenis extraneis vel privatis. Ita tamen quod Merces quæ vulgariter Merceriæ vocantur ac Species, minuciatim vendi poſſint, prout antea fieri conſuevit: Et quod omnes prædicti Mercatores Merchandiſas ſuas quas ipſos ad prædictum Regnum & Poteſtatem noſtram adducere, ſeu infra idem Regnum & Poteſtatem noſtram emere, vel alias acquirere contigerit, poſſint quo voluerint, tam infra Regnum & Poteſtatem noſtram prædictam, quam extra ducere, ſeu portari facere præterquam ad terras manifeſtorum & notoriorum

rum hoſtium Regni noſtri ſolvendo conſuetudines quas debebunt, Vinis duntaxat exceptis, quæ de eodem Regno ſeu Poteſtate noſtra, poſtquam infra idem Regnum, ſeu Poteſtatem noſtrum ductafuerint, ſine voluntate noſtra & licentia ſpeciali, non liceat eis educere quoquo modo.

the Cuſtoms which ſhall be due, Wines only excepted, which ſhall not be exported out of Our ſaid Kingdom or Dominion, after they have been imported into Our ſaid Kingdom or Dominion, without Pleaſure and eſpecial Licence, by any way or means whatſoever.

Item, Quod prædicti Mercatoris, in Civitatribus Burgis prædictis pro voluntare ſua hoſpitari valeant, & morari Villis ac cum bonis ſuis, ad gratum ipſorum quorum fuerint hoſpitia ſive domus.

Item, That the ſaid Merchants may lodge in the Cities, Boroughs, and Towns aforeſaid, at their own pleaſure, and there ſtay with their Goods, to the content of them who entertain them.

Item. Quod quilibet contractus per ipſos Mercatores cum quibuſcunque perſonis, undecunque genere ſuper quocunque, fuerint Merchandiſæ, initus firmus ſit & ſtabilis; ita quod neuter Mercatorum ab illo Contractu poſſit diſcedere, vel reſilire, poſtquam denarius Dei inter principales perſonas contrahentes, datus fueri & receptus. Et ſi forſan ſuper contractu hujuſmodi contentio oriatur, fiat inde probatio aut inquiſitio ſecundum uſus & conſuetudines Feriarum, & Villarum ubi dictum Contract-

Item, That every Contract made by the ſaid Merchants with what Perſons ſoever, and from what Places ſoever, for what kind of Merchandizes ſoever, ſhall be firm and ſtable, ſo that neither of the Merchants ſhall depart from, or go back from his Bargain, after a *Gods-penny* is given and received between the principal Perſons contracting; and if it happen that a contention ariſe on the ſaid Contract, there ſhall be a Tryal, or Inquiſition, according to the Uſages and Cuſtoms of the Fairs, and Towns where ſuch Con-

Contract ſhall be made or begun.

um fieri contigerit, & inire.

Item, We promiſe to the aforeſaid Merchants, and for Us, and our Heir, for ever grant, That We by no means whatſoever will make, nor ſuffer to be made, any Prize, or Arreſt, or Detention by occaſion of Prize, for the future, upon their ſaid Wares, Merchandizes, or other their Goods by Us or by any other, or others in any caſe and neceſſity whatſoever, againſt the will of the ſaid Merchants, without the price preſently paid, for which the ſaid Merchants might ſell to others, Wares of the like ſort for, or otherwiſe to ſatisfie them, ſo as they ſhall repute themſelves contented. And that no Appraiſment or Value ſhall be put upon the ſaid Merchants Wares, Merchandizes, or Goods, by Us or Our Miniſters.

Item, Promittimus præfatis Mercatoribus pro nobis, & heredibus noſtris, in perpetuum concedentes. Quod nullam priſam vel arreſtationem, ſeu dilationem occaſione priſæ de cætero de Mercimoniis, Merchandiſis, ſeu aliis bonis ſuis per nos, vel alium, ſeu alios, pro aliqua neceſſitate vel caſu, contra voluntatem ipſorum Mercatorum aliquatenus faciemus, aut fieri patiemur; niſi ſtatem ſoluto pretio pro quo ipſi Mercatores aliis hujuſmodi mercimonia vendere poſſint, vel eis alias ſatisfactio ita quod reputent ſe contentos, & quod ſuper mercimonia, merchandiſas, ſeu bona ipſorum per nos, vel miniſtros ſuos, nulla appreciatio, aut æſtimatio imponetur.

Item, We will, That all Bailiffs, and Officers of Fairs, Cities, Boroughs, and Market Towns, ſhall do ſpeedy Juſtice to the ſaid Merchants complaining to them, from day to day, without delay, according to the *Merchants Law*, concerning all and every thing which by the

Item, Volumus, Quod omnes Ballivi, & Miniſtri Feriarum, Civitatum, Burgorum & Villarum Mercatoriarum, Mercatoribus antedictis conquerentibus coram eis, celerem juſtitiam facient de die in diem ſine dilatione ſecundum LEGEM MERCATORIAM, de univerſis

lis & ſingulis que per eandum Legem poterunt terminari. Et ſi forte inveniatur defectus in aliquo Ballivorum vel Miniſtrorum predictorum unde iidem Mercatores, vel eorum aliquis dilectus incommoda ſuſtinuerint, vel ſuſtinuerit, licet Mercator verſus partem in principali recuperaverit dampna ſua, nihilominus Ballivus, vel Miniſter alius verſus Nos, prout delictum exigit, puniatur, & punitionem iſtam concedimus in favorem Mercatorum predictorum. pro eorum juſtitia maturanda.

Item, Quod in omnibus generibus placitorum, ſalvo caſu criminis pro quo inſtigenda ſit poena mortis, ubi Mercator imlpacitatus fuerit vel alium implacitaverit, cujuſcunque conditionis idem implacitatus extiterit, extraneus vel privatus, in Nundinis, Civitatibus, ſive Burgis ubi fuerit ſufficiens copia Mercatorum predictarum terrarum, & inquiſitio fieri debeat, ſit medietas Inquiſitionis de eiſdem Mercatoribus, & medietas altera de aliis probis & legalibus hominibus loci illius, ubi placitum il-

ſaid *Law* may be determined. And if any defect ſhall happen to be found in any of Our Bailiffs or Miniſters aforeſaid, whereby the ſaid Merchants, or any of their Factors ſhall ſuffer loſs, although the Merchant recover his Loſſes againſt the Party in the whole, yet nevertheleſs, the Bailiff, or other Miniſters of ours, as the fault requires, ſhall be puniſhed; and We grant the ſaid Puniſhment in favour of the Merchants aforeſaid, for compleating their Right.

Item, That in all kinds of Pleas, ſaving in the caſe of Crime, for which the pain of Death is liable to be inflicted, where the Merchant ſhall be impleaded, or he implead another, of whatſoever condition he that is impleaded be of, whether a Foreigner or a Domeſtick, in the ſaid Fairs, Cities, or Boroughs, where there is a ſufficient plenty of Merchants of the Lands aforeſaid, and Inquiſition there ought to be made; half of the Inquiſition ſhall be of the ſaid Foreign Merchants, and the other half of honeſt and lawful Men, where the Plea happens

to be: And if a ſufficient number of the Merchants of the ſaid Lands ſhall not be found, let thoſe be put in the Inquiſition who ſhall be found fit in that place, and let the reſidue be of other good and fit Men, in the places in which that Plaint ſhall be.

Item, We will ordain, and appoint, That in every Market Town, and Fair of Our ſaid Kingdom, and elſewhere within Our Dominion, *Our Weight* is to be put in a certain place, and before weighing thereof, the Scale to be empty in the preſence of Buyer and Seller, and the Arms thereof to be equal; and when he hath ſet the Scale equal, he is forthwith to take off his Hands, ſo that it may remain equal, and that throughout Our whole Kingdom and Dominion, there be one Weight and Meaſure, both of them ſealed with the Sign of Our Standard, and that every one may have a Scale of one *Quarterom* and under, where contrary to the Governour of the ſaid place, or Liberty by Us, or Our Anceſtors it was not granted, or contrary to the

lud eſſe contigerit: Et ſi de Mercatoribus dictarum Terrarum numerus non inveniatur ſufficiens, ponantur in Inquiſitione illi qui idonei invenientur ibidem, & reſidui ſint de aliis bonis hominibus & idoneis, de locis in quibus placitum illud erit.

Item, Volumus, Ordinamus & Statuimus, Quod in qualibet Villa Mercatoria & Feria Regni noſtri prædicti, & alibi infra Poteſtatem noſtram, Pondus noſtrum *in* certo loco ponatur, & ante ponderationem Statera in præſentia Emptoris & Venditoris vacua videatur, & quod brachia ſint æqualia, & extunc Ponderator ponderet in æquali & cum Stateram poſuerit in æquali, ſtatim amoveat manus ſuas ita quod remaneat in æquali, quodq; per totum Regnum & Poteſtatem noſtram unum ſit pondus & una menſura, & ſigno Standardi noſtri ſignentur, & quod quilibet poſſit habere Stateram unius Quarteroni & infra, ubi contra Dominum loci, aut libertatem per Nos, ſeu Anteceſſores noſtros conceſſam illud non fuerit, ſive contra Villarum

aut

at Ferſatum conſuetu-
...tem hactenus obſerva-
...m.

Item, Volumus & concedimus, Quod aliquis certus homo, & fidelis, & diſcretus London reſidens, aſſignetur Juſtitiarius Mercatoribus memoratis, coram quo valeant ſpecialiter placitare, & debita ſua recuperare celeriter, ſi Vicecomites & Majores eis non facerent de die in diem celeris juſtitie complementum, & inde fiat Commiſſio extra chartam præſentem conceſſa Mercatoribus antedictis, ſcilicet, de his quæ ſunt inter Mercatores & Mercatores, ſecundum LEGEM MERCATORIAM deducenda.

Item, Ordinamus & Statuimus, & Ordinationem illam Statutumque pro Nobis & Hæredibus noſtris in perpetuum Volumus firmiter obſervari, quod pro quacunque libertate quam Nos vel Heredes noſtri de cætero concedimus, præfati Mercatores ſupra-ſcripts Libertates, vel earum aliquam non amittant. Pro ſupradictis autem Libertatibus & liberis Conſuetudinibus obtinendis, & Priſis noſtris remittendis eiſdem

Cuſtom of the Villages and Fairs hitherto obſerved.

Item, We will and grant, That ſome certain faithful and diſcreet Perſon reſiding in *London*, may be appointed a *Juſtice* in behalf of the before-mentioned Merchants, before whom they may plead ſpecially, and more ſpeedily recover their debts, if the Sheriffs and Mayors diſtribute not to them, day by day compleat and ſpeedy Juſtice, that then a Commiſſion be granted to the aforeſaid Merchants, beſides this preſent Charter, *viz.* concerning thoſe [*Goods*] which are to be conveyed between Merchants and Merchants, according to the *Merchants Law*.

Item, We Ordain and Appoint, and Our Will and Pleaſure is, for Us and Our Heirs, That this Ordinance and Statute be firmly kept for ever, notwithſtanding any liberty whatſoever which We or Our Heirs for the future ſhall grant; the ſaid Merchants ought not to loſe their above-written Liberties, or any of them: And for and in conſideration of their obtaining the ſaid Liberties and free Uſages, and Our Priſes

to

to be remitted to them: All and ſingular the ſaid Merchants for themſelves, and all others on their part, have heartily and unanimouſly granted to Us that for every *Hogſhead of Wine* which they ſhall bring in, or cauſe to be brought in within Our Kingdom or Dominion thereof; and from whence they are obliged to pay Freight to the Mariners, to pay to Us and to Our Heirs, by the Name of Cuſtom, two Shillings over and above the ancient Cuſtoms due, and accuſtomed to be paid in *Pence* within forty days after the ſaid Wines are put on ſhore out of the Ships

ſepedicti Mercatores univerſi & ſinguli pro ſe & omnibus aliis de partibus ſuis, Nobis concorditer & unanimiter conceſſerunt quod de quolibet Dolio vini quod adducent, vel adduci facient infra Regnum & Poteſtatem noſtram, & unde Marinariis frettum ſolvere tenebuntur, ſolvent Nobis & Heredibus noſtris nomine Cuſtumæ, duos Solidos ultra antiquas Cuſtumas debitas, & in Denariis ſolvi conſuetas, nobis aut aliis infra quadraginta dies poſtquam extra Naves ad Terram poſita fuerint dicta vina.

Item, For every *Sack of Wooll*, which the ſaid Merchants or others in their Names do buy, and out of this Kingdom tranſport, or buy to tranſport; ſhall pay forty pence over and above the ancient Cuſtom of half a Mark, which formerly was paid. And for a Laſt of Hides carried out of this Our Kingdom and Dominion thereof to be ſold, half a Mark over and above, that which according to ancient Cuſtom was formerly paid

Item, De quolibet Sacco Lanæ, quem dicti Mercatores, aut alii nomine ipſorum ement & de Regno noſtro educent, aut emi & educi facient, ſolvent quadraginta Denarios de incremento, ultra Cuſtumam antiquam dimidiæ *Marcæ* que prius fuerat perſoluta. Et pro Laſto Coriorum extra Regnum & Poteſtatem noſtram vehendorum dimidiam Marcam, ſupra id quod ex antiqua Cuſtuma antea ſolvebatur; Et ſimiliter de trecentis pellibus Lanutis, extra Regnum & Po-

oteſtatem noſtram, dedu-
ndis, quadraginta denari-
ultra certum illud quod
antiqua Cuſtuma fuerat
ius datum.

Item, Duos Solidos de
ualibet Scarleta, & panno
nto in grano.

Item, Decem et octo de-
arios de quolibet panno in
uo pars grani fuerit in-
ermixta.

Item, Duodecim dena-
ios de quolibet panno alio
ine grano.

Item, Duodecim dena-
ios de quolibet Ceræ quin-
tallo.

Cumque de præfatis
Mercatoribus nonnulli eo-
rum alias exerceant Mer-
chandiſas, et de aliis re-
bus ſubtilibus,* ſicut de pan-
nis Tarſen, de Serico, de
Cindatis, at Seta, et aliis
diverſis mercibus, et de e-
quis etiam, ac aliis anima-
libus, Blado, et aliis rebus,
et Merchandiſis multimodis,
quæ ad certam Cuſtumam
facile poni non poterunt,
iidem Mercatores conceſſe-
runt dare Nobis et Herede-
bus noſtris de qualibet li-
bra argenti eſtimationis ſeu
valoris rerum et Merchan-
diſarum hujuſmodi quocun-
que nomine cenſeantur,
tres denarios de libra in
introitu

and likewiſe for three hundred Woollfels to be carried out of this Kingdom, forty pence, beſides that certain Sum which according to antient Cuſtom was formerly given.

Item, Two Shillings for every Scarlet, and Cloth dyed in grain.

Item, Eighteen pence for every Cloth in which part of a grain colour is intermixt.

Item, Twelve pence for every other Cloth without grain.

Item, Twelve pence for every Quintal of Wax.

And whereas ſome of the ſaid Merchants deal in other Commodities, as Goods weighed with *Avoir-du-pois* Weights, and in other fine Goods, as Cloth of *Tarſe*, of Silk, of * *Candatis*, of Hair, and in divers other Merchandizes, in Horſes alſo, and other Animals, Corn, and other Wares and Merchandizes of different ſorts, which cannot eaſily be put to a certain rate of Cuſtom; The ſaid Merchants have conſented to give Us and Our Heirs for every Twenty Shillings eſtimation and value of thoſe Wares and Merchandizes, by whatſoever name

* *It is ſuppoſed it ſhould be* Sindonibus, *of lawn, Cambrik, or other fine Linnen.*

name they be called, three pence in the pound, upon the Entrance of their Wares and Merchandizes into Our Kingdom and Dominion aforeſaid, within twenty days after ſuch Wares and Merchandizes ſhall be brought into our Kingdom and Dominion aforeſaid, and there ſhall be unladen, or ſold, And likewiſe three pence for every twenty Shillings, at the Exporting of what kind ſoever of Wares or Merchandizes bought in Our Kingdom and Dominion aforeſaid, beſides the ancient Cuſtoms formerly given to Us, or to others. And over and above the value and eſtimation of the ſaid Wares and Merchandizes for which three pence for every twenty ſhillings as aforeſaid are to be paid; they are to have credit by Letters, by them to be produced from their Principals or Partners, and if they have none, Let it be determined in this caſe, by the Oaths of the ſaid Merchants, or in their abſence, of their Servants.

introitu rerum, et Merc- diſarum, ipſarum in R- num et Poteſtatem noſt- prædictam infra viginti poſtquam hujuſmodi Re- Merchandiſæ in Regn- et Poteſtatem noſtram a- ductæ, et etiam ibidem exo- ratæ, et etiam ibidem exo- ratæ, ſive vendi[t]æ, fuerin-. Et ſimiliter tres denar- de qualibet libra argenti- eductione quarumcunque re- rum, et Merchandiſarum re- rum, et Merchandiſar- hujuſmodi emptarum i- Regno et Poteſtate noſtra prædictis, ultra Cuſtumas antiquas nobis, aut aliis ante datas. Et ſuper va- lore et æſtimatione rerum et Merchandiſarum hujuſmo- di, de quibus tres denar- de qualibet libra argen- ſicut prædicitur ſunt ſol- vendi; credatur eis per li- teras quas de Dominis aut ſociis ſuis oſtendere po- terunt et ſi literas non ha- beant, Stetur in hac parte ipſorum Mercatorum ſi præ- ſentes fuerint, vel vallet- torum ſuorum in eorundem Mercatorum abſentia Juramentis.

Moreover, It may be lawful for the Society of the Merchants aforeſaid, to ſell Wooll to the Fel-

Liceat inſuper Sociis de Societate Mercatorum prædictorum infra Regnum et Poteſtatem noſtram prædict-

..cam, Lanas vendere aliis ..ctis ſuis, et ſimiliter e..ere ab eiſdem abſque Cu..uma ſolvenda; ita tamen ..uod ſolvenda; ita tamen ..uod dictæ Lanæ ad tales ..anus non devenıant, quod ..e Cuſtuma nobis debita de..raudemur.

lows of the ſaid Society, and likewiſe to buy the ſame one of another within Our Kingdom and Dominion, without payment of Cuſtom: Provided that the ſaid Wooll come not to ſuch hands whereby we may be defrauded of Our Cuſtoms.

Et præterea eſt ſcien..dum, Quod poſtquam ſæ..pedicti Mercatores ſemel in uno loco infra Regnum et Poteſtatem noſtram Cuſtumam nobis conceſſam ſuperius, pro Merchandiſis ſuis in forma ſolverint ſupradicta et ſuum habeant inde Warrantum, erunt liberi et quieti in omnibus aliis locis infra Regnum et Poteſtatem noſtram prædictam, de ſolutione Cuſtumæ hujuſmodi pro eiſdem Merchandiſis, ſeu Mercimoniis per idem Warrantum, ſive hujuſmodi Merchandiſæ infra Regnum et Poteſtatem noſtram remaneant, ſive exterius deferantur, Exceptis vinis quæ de Regno et Poteſtate prædictis, ſine voluntate et licentia noſtra ſicut prædictum eſt, nullatenus educantur.

And furthermore be it known, That after the ſaid Merchants have once in any one place within Our Kingdom and Dominion paid our Cuſtoms granted, as aforeſaid, to Us, for their Merchandizes in form aforeſaid, and thereupon they have their Warrant, they ſhall be free, and unmoleſted in all other places within Our Kingdom and Dominion, from payment of the ſaid Cuſtom for the ſame Commodities or Merchandizes by the ſaid Warrant, whether ſuch Merchandizes remain within Our Kingdom and Dominion, or are carried out, Except VVines which without Our leave or licence, as aforeſaid, are by no means to be Exported out of our Kingdom.

Volumus autem, ac pro Nobis & Hæredibus noſtris concedimus, Quod nulla Exactio, Priſa vel

VVe will alſo, and for Us, and our Heirs grant, That no Exaction, Priſe or Loan, or any other burden

burden ſhall be impoſed in any part or meaſure on the perſons of the ſaid Merchants, their Merchandizes, or Goods, contrary to the form before expreſſed and granted.

VVitneſs hereto, The Reverend Fathers *Robert* Archbiſhop of *Canterbury* Primate of all *England*, *Walter* Biſhop of *Coventry* and *Litchfield*, *Henry de Lacy* Earl of *Lincoln*, *Humphrey de Bohun* Earl of *Hereford* and *Eſſex*, and Conſtable of *England*, *Adomarus* of *Valentia*, *Galfrid* of *Geynvil*, *Hugh de le Spencer*, *Walter de Bello Campo* Chamberlain of our Houſe, *Robert* of *Bures*, and others. Given by Our Hand at *Weſtminſter* the Firſt day of *February*.

Preſtatio, aut aliquod aliud onus ſuper perſonas Mercatorum prædictorum, Merchandiſas, ſeu bona eorundem aliquatenus imponatur, contra formam expreſſam ſuperius, et conceſſam.

Hiis teſtibus venerabilibus Patribus Roberto Cantuarienſi Archiepiſcopo totius Angliæ Primate, Waltero Coventr. et Litchf. Epiſcopo, Henrie de Lacy, Comite Lincoln, Humfrido de Bohun, Comite Hereford. & Eſſex. ac Conſtabular. Angl. Adomar. de Valentia, Galfrido de Geynvill, Hugone le de Spencer, Waltero de Bello Campo Seneſcallo Hoſpitii noſtri, Roberto de Bures et aliis. Dat. per manum noſtram apud Weſtm. primo die Feb.

Sir John Davies in the Caſe of *Cuſtoms*.

VIII. Subſidy is a Duty payable for Merchandizes Exported and Imported, granted by Act of Parliament for the life of the King. And are,

1. Aids and Subſidies payable out of Native Commodities Exported and Imported.

Vide the Stat. 12 *Car.* 2. of Tunnage and Poundage.

2. *Tunnage*, which is a Subſidy out of Wines of all ſorts; and *Poundage*, which is a Subſidy granted out of all Commodities Exported and Imported, except Wines and ancient Staple Commodities, and is the twentieth part of the Merchandize, Impoſts or Duties payable for Merchandizes rated and aſſeſſed by Parliament; and then they are in the nature of Subſidies impoſed by the King's Prerogative.

The Rates are generally agreed on by the Commons Houſe of Parliament, and are expreſt in a Book commonly

ommonly called the *Rates of Merchandize*; that is to ſay, the Subſidy of Tunnage and Poundage, and the ubſidy of Woollen Clothes or old Drapery, and are ubſcribed with the hand of the Speaker.

IX. All Merchant-Strangers bringing in any ſort f Wines, are to pay Thirty ſhillings on the Tun over and above the Rates which the Natives pay, including Twenty ſhillings the Tun formerly paid to is Majeſty by the name of *Southampton* Duties, for all Wines of the growth of the *Levant*; for which ſort of Wines, the Stranger is alſo to pay to the uſe of the Town of *Southampton* for every Butt or Pipe Ten ſhillings. *Vide in tit. Priſage.*

Aliens are likewiſe to pay the ancient Duty of Buttlerage, which is 2 *s. per* Tun.

Rule, *That all ſuch Wines as ſhall be landed in any of the Out-Ports, and Cuſtom paid, and afterwards brought to the Port of* London *by Certificate, ſhall pay ſo much more Cuſtom as they paid ſhort of the Duty due in the Port of* London. Directions in Tunnage.

For every Tun of Beer to be exported in ſhipping Engliſh built in Money muſt be paid Two ſhillings: And for every Tun of Beer Exported in any other ſhipping in Money ſix ſhillings. Directions in Poundage.

X. If there ſhall happen to be brought or carried out of this Realm any Goods liable to the payment of Cuſtom and Subſidy which are omitted in the Book of Rates, or are not now uſed to be brought in or carried out, or by reaſon of the great diverſity of the value of ſome Goods could not be rated; That in ſuch caſe every Cuſtomer or Collector for the time being, ſhall and may levy the ſaid Cuſtom and Subſidy of Poundage according to the value and price of ſuch Goods to be affirmed upon the Oath of the Merchant in the preſence of the Cuſtomer, Collector, Comptroller and Surveyor, or any two of them.

XI. Every *Engliſhman* ſhall pay for every ſhort Cloth containing in length not above 28 Yards, and in weight not above 64 lb. white or coloured by him to be ſhipped and carried out of this Kingdom, Three ſhillings four pence, being after the rate of two farthings and half a farthing and pound weight. Directions for the payment of the Subſidy upon Woollen Cloath or old Drapery.

And

And ſo after that rate for all other ſorts of Clothes of greater length and weight, allowing not above Twenty eight Yards, and ſixty four pound to a ſhort Cloth; that is to ſay, for every pound weight over and above ſixty four pound, two farthings and a half farthing: And for all other ſorts of leſſer Clothes to be allowed to a ſhort Cloth; that is to ſay, every Stranger ſhall pay for every ſhort Cloth *cont.* in length not above 28 yards, and in weight not above 64 lb. white or coloured, by him to be ſhipped or carried out of this Kingdom, Six ſhillings eight pence, beſides the old Duty of one ſhilling and two pence.

And ſo after that rate for all other ſorts of Clothes of greater length and weight; and for all ſorts of leſſer Clothes to be allowed to a ſhort Cloth; That is to ſay,

Dorſet and *Somerſet Dozens*, *Rudge waſht*, *Cardinals*, *Pinwhites*, *Straits*, *Statuets*, *Stockbridges*, *Taveſtock*, ſeven of each ſort ſhall be allowed to a ſhort Cloth.

Tauntons, *Bridgwaters*, and *Dunſtars*, the fifty not exceeding 64 lb. in weight; *Devon.* Dozens containing 12 or 13 yards, in weight 13 lb. five to be allowed to a ſhort Cloth.

Ordinary *Pennyſtones*, or *Foreſt Whites cont.* between 12 or 13 yards, and in weight 28 pounds, *Shorting Pennyſtones cont.* 13 or 14 yards, and in weight 35 pounds unfrized, four to be allowed to a ſhort Cloth.

Narrow *Yorkſhire* Kerſies Whites and Reds, *cont.* not above 17 or 18 yards, and in weight 22 pound. *Hampſhire* ordinary Kerſies, *Newberry* Whites, and other Kerſies of like making *cont.* 24 yards, and in weight 28 lb. Sorting *Hampſhire* Kerſies *cont.* 28 pound, and in weight 32 pound; Three of them to make a ſhort Cloth.

Northern Dozens, ſingle ſorting *Pennyſtones cont.* between 13 and 15 yards, and in weight 53 pound Frized, Two of them to make a ſhort Cloth.

And the Northern Dozens double, one to be accounted for a ſhort Cloth.

All which ſhall go and be accounted for ſhort Clothes, and ſhall pay after the rate of the ſhort

Cloth before rated, and for over-weight two farthings and one half the pound.

The new ſort of Cloth called the *Spaniſh* Cloth, otherwiſe Narrow Liſt, Weſtern Broad Cloth not exceeding 25 yards in length, and 43 pounds in weight, to be accounted two thirds of the ſhort Cloth before rated.

And for every pound weight exceeding 43 pounds, two farthings and half farthing the pound weight.

Cloth Raſhes, *alias* Cloth Serges, *cont.* 30 yards weighing 40 pound, to be accounted two thirds of the ſhort Cloth before rated.

And for every pound exceeding 40 pound weight, two farthings and half a farthing the pound weight.

And for any other ſort of Woollen Cloth of the Old or New Drapery, and not mentioned in that Book, to pay two farthings and half a farthing the pound weight: And for any other ſort of Woollen Cloth of the Old or New Drapery and not mentioned, is to pay two farthings and half a farthing for the Subſidy of every pound thereof.

By the Book of Rates annexed to the Act of Tunnage, and Poundage 5 *l. per Cent.* are allowed to the Merchants out of the Subſidy for Poundage, and 10 *l.* more for ready Money: And whereas 12 *d.* in the Pound is due and payable to the King for Poundage, 6 *d.* in the Pound more is given by another Act called the Additional Duty. And whether or not 5 *l. per Cent.* ſhall be allowed out of this Additional Duty, or not was the Queſtion. *Per Curiam*, 5 *l. per Cent.* ought to be allowed out of the Additional Duty, as well as out of the 12 *d.* per Pound, for it appears in divers Places of the Book of Rates, that 6 *d.* in the Pound is lookt upon as part of the Subſidy of Poundage, and 5 *l.* is to be allowed out of all Subſides. The Book of Rates is Incorporated into the Act of Parliament, and is part of it, ſo that whatever is there muſt be taken as compriſed in the Body of the Act it's ſelf, *Papillion* againſt Sir *John Harriſon*, *Hardreſs*, 349.

CHAP. XIII.

Of Impoſitions Subſequent. Conditional, Temporary, &c.

I. *Of Impoſitions on the Manufactures of* Fance *by* Lex Talionis.
II. *On Vinegar, Perry, Cider, and Rape, Cuſtoms payable by Deniſons and Strangers, and Log-wood made Importable.*
III. *On Ships that have not two Decks, and 16 Guns.*
IV. *On Salt, Beer, Sider, Perry, Vinegar, a further Duty.*
V. *Of the Duty called* Coynage, *and upon what impoſed; and the temporary Impoſition called the Additional Duty.*
VI. *Of Goods particular Imported by Aliens; and Rules for petty Cuſtoms and other matters relating to Duties.*
VII. *Of Aliens Cuſtoms on Fiſh and other Commodities, and Rates upon the ſame.*
VIII. *Impoſitions on Foreign Liquors, and Rates on the ſame.*
IX. *Of Native Commodities, and ſuch as were formerly prohibited, may be tranſported, paying certain Duties.*
X. *Beer, &c. Exported; Skins, Leather, &c. Tranſportable paying certain Duties—— Bullion and Coyn only excepted.*
XI. *Of Spices importable by any Nation.*
XII. *Of great and leſſer Officers Fees, and of Goods not paying one pound Cuſtom in or out, what Fees to be taken.*
XIII. *Voluntary Gifts from ſome eſteemed on Bribes and Rates about payment of Fees.*
XIV. *Of Allowances for Jury, what.*

Subſequent Impoſitions to the Act of Tunnage and Poundage, and the Book of Rates.

I. THere are ſeveral Duties impoſed ſubſequent to the Duties payable by the Book of Rates and over and above the ſame; that is to ſay, on all Ships belonging to the *French* King's Subjects, which ſhall lade or unlade any Goods in this Kingdom, or ſet on ſhore or take in any Paſſenger, or pay 20 s. *per* Tun: This was an *Oliver* for a *Rowland*, the *French* King having done us the like kindneſs, by impoſing the value of 50 *Solz* on every *Engliſh* Ship; this Complement laſted but three weeks longer than the *French* King's; his removed, ours drops.

12 *Car.* 2.

This collected as the Tun.

II. So likewiſe on Vinegar, Perry, Rape, Cider, and Cider-eager imported from Foreign parts *per Engliſh*

Engliſh, ſhall anſwer Six pounds ten ſhillings *per* Tun; if by Strangers, then but ſix pounds.

But if they ſhall Export, then Three pounds ten ſhillings *per* Tun ſhall be repaid to the *Engliſh*, and Four pounds fifteen ſhillings to be repaid to Strangers.

The Statute of *Eliz. cap.* prohibiting the Importation of Log-wood, repealed; and the ſame may be imported paying 5 *l. per* Tun: And in caſe of Exportation then to be repaid 4 *l. per* Tun.

...nage and Poundage is directed. 14 *Car.* 2. *c.* 11. For preventing of Frauds. 14 *Car.* 2. *c.* 11.

III. The Parliament taking likewiſe again into conſideration the encouragement of Trading in Ships of force, have impoſed on all Goods and Merchandize imported and exported from and to the Mediterranean Sea, beyond *Malaga*, in any Ship that hath not two Decks and ſixteen Pieces of Ordinance mounted, and two Men to each Gun, to pay over and above the Rates impoſed by the Book of Rates one *per Cent.* This does not extend to Ships laden with Fiſh, or half laden with Fiſh and other Commodities. 14 *Car.* 2. *cap* 11.

IV. So likewiſe on Salt out of *Scotland* into *England*, one half-penny *per Gallon*.

Again, there is impoſed on Wines, Vinegar, Cider and Beer, ten ſhillings *per* Tun; and on Brandy and Strong-Waters 20*s. per* Tun. For the Coynage Duty, the Monies that ariſe on this Duty are to be paid at the Cuſtom-Houſe to the Collectors and Officers, to be by them kept apart from all other Monies, and paid Quarterly into the Exchequer without Salery or Fee: The Goods are forfeitable for non-payment of this Duty; and the ſame is to be re-paid, if the Goods are tranſported within one year. 18 *Car.* 2. *cap.* 9.

V. There was likewiſe an Impoſition of 12 *l. per* Tun on *Spaniſh* Wines, and 8 *l. per* Tun on *French* Wines and Vinegar, which was but temporary, and ended the 24*th* of *June*, 1678. 22 *Car.* 2. *c.* 3.

VI. There are alſo Duties payable by all Aliens for Goods imported in Aliens Ships, commonly called *Navigation-Duties*. *Per* Act of Nav. 12 *Car. cap.* 18. *V. de.* the Statutes and the particular Com...

So likewiſe all Goods of the growth, product, or Manufacture of *Muſcovia* or *Ruſſia*, and alſo of *Turkey*.

modities enumerated there. *Note*, That in all caſes where petty Cuſtom inw
is payable, it is to be underſtood of the fourth p
of the full Subſidy according to the Rates and V
Rule. lue in the Book of Rates, before the 5 *l. per Cen.*
deducted.

Rule. *Note*, Wines of all ſorts imported are to pay A
Vid. the Table of Strangers Duties upon Wines. ens Duties.

Note, That the Neat Subſidy of Vinegar, Per
Rape, Cider, and Cider-eager both in *London* and o
14 *Car.*2.*Vide* Table of *French* Wines. Ports, is the ſame with the Subſidy of *French* Wi
payable in *London*.

Act of Navigation, 12 *Car.* 2 *cap.* 18. VII. So likewiſe there is a further Impoſition call
Aliens Cuſtom for all Fiſh, Oil, Blubber, Wha
bone, or Whale-fins, not being caught in Veſſ
Act of Trade 15 *Car.*2. *cap.* 7. *Vide* Stat. and the particulars enumerated. belonging to *Engliſh* Men, are to pay double Strange
Cuſtom.

So likewiſe Cuſtom and Impoſt to be paid for ſeve
ral ſorts of ſalted or dried Fiſh not imported *in Ship*
Engliſh built, or belonging to *England*, and not ha
ving been ſtifled and caught in ſuch Ships.

Rule. Upon which ACT, *Note*, That the 5 *per Cent.* i
not to be allowed of the Petty Cuſtom.

12 *Car.* 23, 24. VIII. There is likewiſe an Exciſe or Impoſt upo
22 *Car.* 2. 4. Foreign Liquors imported; that is to ſay, Beer o
Ale 6 *s. per* Barrel; Cider or Perry the Tun ten ſhil
lings; Brandy or Strong-waters perfectly made, 8 *d.*
per Gallon.

15 *Car.* c. 11. If any of thoſe Goods be landed before thoſe Du
ties be fully paid, and Warrant ſigned, and without
preſence of an Officer, they are forfeited to the In
former half.

IX. There are likewiſe Duties impoſed on ſeveral Com
modities Exported by ſeveral Acts of Parliament ſub
ſequent to the Act of Tunnage and Poundage.

Act for Trade 15 *Car.* 2. *cap.* 7. Coals tranſported in *Engliſh* Shipping and Naviga
tion for his Majeſties Plantations in lieu of all Cu
ſtom, ſhall pay only for one Chaldron of *New-Caſtle*
meaſure 1 *s.* 8 *d.* For one Chaldron *London* meaſure
1 *s.* provided good Security be given for landing the
ſaid Coals accordingly.

Act for Tillage, 22. *Car.* 2. *cap.* 3.) There are likewiſe ſeveral Native Commodities
and Cattel prohibited by divers Acts of Parliament

not to be tranſported unleſs ſold under ſuch prizes; but *non obſtante* they may now be exported, paying Cuſtom according to the Book of Rates.

X. There is likewiſe an Impoſition on Beer, Ale, and Mum to be exported, to pay 1 *s. per* Tun and no more; but this is but *pro tempore* for ſix years. 22, 23 *Car.* 2. 20 *Car.* 2. *cap.* 5.

So likewiſe Leather of all ſorts, Sheep-skins, Calve-skins, tanned or dreſſed, *non obſtante* any former Law, paying for each hundred weight *cont.* 112 *l.* weight one ſhilling and no more: This ended on 25*th of March*, 1675. and both of them to the end of the next Seſſions of Parliament after. 20 *Car.* 2. *cap.* 5.

Likewiſe all ſorts of Foreign Coyn or Bullion of Gold or Silver may be Exported without paying any Duty or Fee for the ſame, Entry being firſt made in the Cuſtom-houſe; the like for Diamonds, Precious-Stones, Jewels, and Pearls of all ſorts. Act for Trade 15 *Car.* 2. *cap.* 7.

XI. All Perſons whatſoever may import from any place beyond Sea in *Engliſh* Ships, Mace, Nutmegs, Cinamon, Cloves into *England*, *Wales*, *Jerſey*, *Guernſey*, paying the Cuſtoms thereof. Provided before the lading thereof they give notice to the Commiſſioners or Farmers of the Cuſtoms, of the quantity and quality they intend to lade, with the name of the Veſſel in which they intend to import the ſame, and procure a Licence under the hands of the ſaid Farmers or Commiſſioners, or any three of them for the importing the ſame. *Proclam. C.* 2. *Regis, Dec.*20. 1662. *Aug.*26. 1663. But ſee 14 Car. 2. concerning Cuſtoms.

Note, If Goods are wreck'd, and the Lord ſeizes them, yet they ought not to pay Cuſtom. * So held by Three Juſtices, *contra.* Chief Juſtice *Treby*, *Trin.* 11. *W.* 3. *Co. Pl. Courtrey* againſt *Bower*.

* Sir *Francis Moor's* Report *fol.* 224. Lord *Cobham's* Caſe. The like not ſince adjudged in the *Common Pleas* (on a ſpecial Verdict found at St *Edmonds-Bury* in *Suffolk*) about *Mich.* or *Hill.* 25, & 26 *Car.* 2.

XII. Fees and allowances due and payable to the Officers of his Majeſties Cuſtoms and Subſidies in the Port of *London*, and the Members and Creeks thereunto belonging; that is to ſay, to the Officers of the Petty Cuſtoms Outward, Subſidy Outwards; Petty Cuſtoms Inwards, Subſidies Inwards; Great

Cuſtoms, Clerks Fees Inwards and Outwards, the King's Waiters being in number Eighteen, the Regiſter of the King's Warrants, the Uſher of the Cuſtom-houſe, Gaugers of *French* Veſſels, chief Searcher, and his Majeſties five under Searchers in the Port of *London*; and the two Searchers at *Graveſend* were all ſet and entred in a Table; the ſame was ſettled by the Commons Houſe of Parliament, and ſigned by the Right Honourable Sir *Edward Turner* late Lord Chief Baron of his Majeſties Court of *Exchequer*, and then Speaker to the Commons Houſe of Parliament; at which time the Queſtion being put, That for all Goods not paying one pound Cuſtoms in or out, there ſhall be but half Fees taken for all Cocquets, Warrants, Debentures, Tranſires or Certificates, it was reſolved in the affirmative.

Virtute cujuſdam Ordin. à Dom. Com. Sabbati 17 Maij, 14. Car. 2. Regis.

XIII. Societies or Companies trading in a joint ſtock, and making but one ſingle Entry, the Adventurers being many, the Table of Fees does not hinder, but the Officers and Waiters may receive ſuch gratuity as the Company voluntarily give.

All Goods under the value of 5 *l.* in the Book of Rates, paying Subſidy the Sum of 5 *s.* or leſs, ſhall paſs without payment of Fees.

Engliſh Merchants that ſhall land out of one Ship at one time, (although the receipt of the Subſidy be diſtributed into ſeveral Offices) ſhall not pay any more than for a ſingle Entry.

The Goods of Partnerſhip to paſs as if the propriety were in one ſingle Perſon.

Fiſh by *Engliſh* in *Engliſh* Shipping or Veſſels Inwards or Outwards all along the Coaſt, to pay no Fee.

Poſt-entries inward to paſs without Fee under five ſhillings; if above five ſhillings and under forty ſhillings, then ſix pence: But if the Cuſtom to be paid exceed 40 *s.* then full Fees.

The Merchant ſhall pay for all Goods opening that ſhall be ſhort entred above 10 *s.* Cuſtom.

The Merchant ſhall pay for weighing of all Goods that ſhall be ſhort entred above 20 *s.* Cuſtom.

The

The Merchant is not to be at any charge, if duly entred.

XIV. There is likewiſe to be allowed to the Merchants a certain abatement called *Tare*, for Goods and Merchandize, the which is reduced into a Table and cannot be deviated from in any caſe within the Port of *London*, without ſpecial direction of the Commiſſioners or Farmers; or in their abſence of the conſent of the General Surveyors, and Surveyor of the Ware-houſe, or of two of them at the leaſt, whereof the Surveyor of the Ware-houſe to be one; and in the out Ports not without the Conſent and advice of the Collector and Surveyor: Or where there is no Surveyor, by the Collector himſelf, giving ſpeedy notice to the Commiſſioners or Farmers of the reaſon of ſo doing.

Tare and Tret, the firſt is the weight of the Cask, or Bale, or Covering wherein Goods are packed; the other is a conſideration allowed in the weight for emptying and refilling the Goods.

CHAP. XIV.

Of Scavage, Package, Porterage, Water-Baillage, Ports, Members, Creeks, the Port of London, and places lawful to lade and unlade in.

I. Scavage, *what, where payable, and to whom.*
II. *Who pay the ſame, and how regulated and governed.*
III. *Goods omitted in the* Scavage, *Table of Rates, how to pay.*
IV. *Of* Package, *how governed, and where payable.*
V. *Where Strangers ſhall pay as of old.*
VI. *Of Packers, Water-ſide Porters, what Duties Strangers are to pay for ſhipping out their Goods.*
VII. *Of the Duty of Water-Baillage,*
VIII. *Of Ports, Members, and Creeks, what are meant and underſtood by them in reference to action, lawful or unlawful.*
IX. *The ſeveral Ports, Members and Creeks in* England *and* Wales.
X. *Of the extent of the Port of* London.
XI. *Of the ſeveral* Keys, Wharfs, *and other places lawful for lading of Goods.*
XII. *What Goods are excepted, which may be ſhipped or landed at other places.*

I. SCavage is an ancient *Toll* or *Cuſtom* exacted by Mayors, Sheriffs, *&c.* of Merchant-Strangers for Wares ſhewed or offered to ſale within their Precincts, which is prohibited by the Statute of 19 *H.* 7. *cap.* 8. in a Charter of King *Henry* the Second to *Canterbury*; it is written Scewinge.

The City of *London* ſtill retains the Cuſtom of, which in an old printed Book of the Cuſtoms of *London* it is there mentioned, and how to be diſpoſed; of which Cuſtom, halfen del appertepneth to the Sherifs, and the other halfen del to the Hoſtys, in whoſe houſes the Merchants been lodged; And it is to wet that Scavage is the ſhew, by cauſe that Merchants ſhewen unto the Sheriffs Merchandizes of the which Cuſtoms ought to be taken ore that any there be ſold. &c.

II. The *Scavage* that is taken conſiſts of two parts that

that which is payable by Denizens, and that which is required of Aliens: And that all Perſons ſubject to ſuch Duties might not be impoſed upon, there are Tables mentioning the particular Duties ſet up and approved by the Lords Chancellor, Treaſurer, Preſident, Privy-Seal, Steward, and two Juſtices of the *King's-Bench* and *Common-Pleas*; and by them ſubſcribed, or any four of them at leaſt: The which Duties are on *Goods* Inwards and Outwards. 22 *H.* 8. *c.* 8.

III. *Note*, All Goods mentioned in the Table of *Scavage*, and not mentioned in the Table of Rates, ſhall pay after the Rate of one penny in the pound, according as they are expreſſed and valued in his Majeſties Book of Rates, and all others not expreſſed therein, ſhall pay the ſame Rates according to the true value. *Per* Order of K. *Charles* I. ſubſcribed by *William* Lord Biſhop of *London*. *H.* Earl of *Mancheſter*, L. C. J. *Brampſton*, and Lord *Littleton*.

Note, That all private Baulks 8 inches ſquare and upwards, are by the 23 Article annexed to the Book of Rates reputed Timber, and valued at 3*d*. the Foot, 50 Foot making one Load, the value of which is 12*s*. 6*d*. and the Subſidy for one Load $\frac{5}{8}$ of one penny, or one half penny and half one farthing, out of which the 5 *per Cent*. is to be deducted.

IV. There is likewiſe another Duty called *Package*, the which is likewiſe ſet and rated in a Table, and the which is taken of all the ſeveral Commodities therein mentioned.

All Goods not mentioned in that *Table*, are to pay for *Package* Duties, after the rate of one penny in the Pound according as they are expreſſed or valued in his Majeſties Books of Rates, and all others not expreſſed therein ſhall pay the ſame rate according to their true value.

For every Entry in the Packer's Book for writing Bills to each Entry outward, as uſually they have done, 12*d*.

V. The Strangers are to pay the labouring Porters for making up their Goods, at their own charge, as always they have done.

Strangers are likewiſe to pay the Water-ſide Porters belonging to the Package Office, ſuch Fees and Duties for Landing and Shipping their Goods, as they

they uſually have done within theſe ten years.

VI. The Packers Water-ſide Porters have Tables of Duties for landing of Strangers Goods, and for the ſhipping out their Goods; and Goods not mentioned in the Table are to pay Portage Duties as other Goods do of like Bulk or condition therein expreſſed.

VII. There is another, ancient Duty called *Water Baillage*, which the City of *London* have received time out of mind, *viz.* for all Goods and Merchandize imported as well from any Port within the Realm to the Port of *London*, as from any part out of the Realm to the ſame, and ſo the like Duties (with ſome variances) for all ſuch Goods as ſhall be exported from the Port of *London* to any other Port within the Realm, ſo likewiſe without: Of this Duty all the Citizens and Freemen of the City are exempted; and though the ſame is very ancient, * and was once but ſmall, in regard, within memory, it was looked upon as an Honour for a Merchant to be a Citizen of *London*, and ſo conſequently freed; but now, eſpecially ſince the late Wars, abundance of Perſons eminent both for Honours and Eſtates being unwilling to entangle themſelves in the publick Affairs of the City, do refuſe abſolutely to accept of the Freedom of the ſame, ſince which there have been great Conteſts with thoſe Traders; and though the Coaſt Duties have been agreed to, yet the Foreign now ariſing to ſome conſiderable value, is highly diſputed. And though Charters, Acts of Parliament, Common-Councils, continued Tracts and Foot-ſteps of ancient Evidences and Records are yet extant to evince and make out the moſt apparent Title that may be, the ſame nevertheleſs labours under the greateſt difficulty amidſt the diviſions of its Proprietors.

* 5 *July*, 1 *Joh.* 7 *R.*2 *num*37

1 *Aug.* 21 *R.*2. entred in the City-Book called *Dunthorn*, *fol* 95. & 97. Repertory *ult.* *Aug.* 1 9 *H.*1.208. 3 *Jac.* &c.

VIII. Port, or *locus publicus*, are thoſe places to which the Officers of the Cuſtoms are appropriated, & which contain and include all the Priviledges and Guidance of all Members and Creeks thereunto allotted.

Portus qua publicus non ſolum mercibus exonerandis inſervit, ſed ut naves ibi tutum receptaculum habeant, & jure debito ac ſecuritate fruantur Navigantes quatenus innocuum iter & ſtationem quærunt. Hinc Portus & Navalia privilegio pacis publicæ gaudent. Arg. 1. *Leg.* 1. §. *ſtationem D. de flum. cap.* 2 *Jur. Nautic. Saed.* 1. 1. §. 1. 4 H. 4. 20.

Members

Members are thoſe places where anciently a Cuſtom-houſe hath been kept, and Officers or their Deputies attending, and are lawful places of Exportation or Importation.

Creeks are places where commonly Officers are or have been placed by way of prevention, not out of duty or right of attendance, and are not lawful places of Exportation or Importation without particular Licence or Sufferance from the Port or Member under which it is placed.

Portus eſt concluſus locus quo importantur merces & exportantur, l. 59. de verb. Sign. Alias ſtatio, quod ibi tuto naves ſtare poſſint, leg. 1. §. 13. D. de flum.

IX. The ſeveral Ports and Members as now they account at the *Cuſtom-houſe*, are,

Ports.	Members.	Creeks.
London.		*Graveſend.*
Ipſwich.	*Malden.*	*Leigh.* *Burnham.* *Weſt Merſey.*
	Colcheſter.	*Eaſt Mercy.* *Brickley.* *Wivenhoe.*
		Maintree. *Harwich.*
Yarmouth.	*Woodbridge.*	
	Alborough.	*Orford.* *Dunwick.*
	Sowold.	*Walderſwich.*
		Leſtoffe.
	Blackney and *Cley.*	
Lynn.	*Wells.*	*Burnham.*
		Hitcham. *Croſs Keys.* *Wisbeech.*

Boſton.

Ports.	Members.	Creeks.
Boſton.		*Spalding.* *Foſdick.* *Wainfleet.* *Numby Chappel.* *Thetlethorp.* *Salt-fleet.*
Hull.	*Grimsby*	*Gainthorp.*
	Bridlington.	
	Scarborough.	
New-caſtle.	*Whitby.*	
	Stockton.	*Middleborough.*
	Hartlepool.	
	Sunderland.	
	Shields.	
		Seaton delaval. *Blith nooke.*
Berwick.		*Aylemouth.* *Warnewater.* *Holy Iſland.* *Eaſt Marches*, containing the Coaſt of *Northumberland*, bordering on *Scotland.*
Carliſle.		*Weſt Marches*, containing the Coaſt of *Cumberland*, bordering on *Scotland.*
	Whitehaven.	*Workington.* *Ravinglas.* *Milnthorpe.*

Cheſt

Ports.	Members.	Creeeks.
Cheſter.	*Lancaſter.*	*Pyte of Fowdery.* *Grange.*
	Bulton.	*Wyrewatr.* *Preſton* and *Rible Water.*
	Liverpool.	*Sankey* Bridge. *Fradſham.* *South* ſhore of the River of *Merſey* to the Red Stones.
		Hilbree. *Dawpool.* *Neſton.* *Burtonhead.* *Baghill.* *Moſtin.*
	Aberconway.	
	Bewmaris.	*Holy-head.* *Amlogh.*
	Carnarvan.	*Pulbely.* *Barmouth.*

Milford.

Ports.	Members.	Creeks.
Milford.	*Aberdovy.*	*Aberuſtab.*
	Cardigan.	*Newport.*
		Fiſcard.
	Pembroke.	*Haverford Weſt.*
		Tenby.
		Carmarthen.
		Laneltby.
		North Burrys.
Cardiffe.	*Swanſey.*	*South Burrys.*
		Neath or *Britton Ferry.*
		Newton.
		Aberthaw.
		Penarth.
		Newport.
		Chepſtow.
Gloceſter.		River *Severn* from *Bridg-North* to *King-Road.*
Briſtol.		*Pill.*
		Upbill.
Bridgwater.	*Minhead.*	

Plymouth.

Ports.	Members.	Creeks.
Plymouth.	*Padſtow.*	
	St. Ives.	
	Penſance.	
	Helford.	
	Falmouth.	*Penrin.*
		St. Maures.
		Truro.
	Fowey.	
	Lowe.	
		Saltaſh.
		Stonehouſe.
		Coſland.
Exeter.	*Ilfracomb.*	
	Barnſtable.	*Clovelly.*
		Appledore.
		Biddiford.
		Tincomb.
		Starcroſs.
		Bear and *Seaton.*
		Topſham.
		Pouldram.
		Sydmouth.
		Lympſon.
		Exmouth.
		Aylmouth.
	Dartmouth.	*Saltcomb.*
		Brixham.
		Torbay.
		Totnes.

Poole.

Ports.	Members.	Creeks.
Poole.	*Lyme.*	*Bridport.*
		Charmouth.
	Weymouth.	*Portland.*
		Lulworth.
Southampton		*Swanidge.*
		Wareham.
		Chriſtchurch.
		Hinington.
	Cows.	*Yarmouth.*
		Newport.
	Portſmouth.	*Emſworth.*
Chicheſter.	*Arundel.*	*Pagham Point.*
		Selſey.
	Shoram.	*Brighthempſton.*
	Lewis.	*New Haven.*
		Seaford.
	Pemſey.	
	Haſtings.	
	Rye.	*Winchelſea.*
		Lyd.
		Rumney
	Hyth.	

Ports.	Members.	Creeks.
Sandwich.	*Dover.*	*Deal.*
		Rumſgate.
		Marget.
		Whitſtable.
	Feverſham.	
	Milton.	
	Rocheſter.	*Quinborough.*

Note, All the Ports and Havens in *England* are *infra Corpus Comit.* and that the Court of Admiralty cannot hold Juriſdiction of any thing done in them. *Holland's* Caſe, Earl of *Exeter*, 30 *H.* 6. And becauſe he held Plea in the Admiralty of a thing done *infra Portum de Hull*, damages were recovered againſt him two thouſand pounds. *Vide Mich.* 12 *Jac. C. B. Greenway verſus Barber*, Godbolt 260, 261.

IX. In regard that the Port of *London* is of great concern in relation to the Cuſtoms, the extent and limits of the ſame Port is by the *Excheque*r ſettled, which is declared to extend and be accounted, from the Promontory or Point called *North-foreland* in the Iſle of *Thanet*, and from thence *Northward* in a ſuppoſed line to the oppoſite *Promontory* or Point called the *Naſe*, beyond the *Gunfleet* upon the Coaſt of *Eſſex*, and continued Weſtward through the River of *Thames*, and the ſeveral Channels, Streams and Rivers falling into it, to *London*-Bridge, ſave the uſual and known Right, Liberty and Priviledge to the Ports of *Sandwich* and *Ipſwich*, and either of them, and the known Members thereof, and of the Cuſtomers, Comptrollers Searchers, and other Deputies and within the

Ad Portus inſtaurationem, quia publicæ utilitatis gratiâ ſit, omnes ſubditi loci conferre operas debent, lib. 7. C. de oper. publ. Portus inſuitu fluminis quo ambitur & vectigalis quod ex navium ſtatione penditur, eſt publicus & hodie Regalibus accenſitur, §. 2. Inſt. de rer. die. l. 4. §. D. eod. c. un. que ſunt Rega.

 ſaid

ſaid Ports of *Sandwich* and *Ipſwich*, and the ſeveral Creeks, Harbours and Havens to them or either of them reſpectively belonging within the Counties of *Kent* or *Eſſex*.

X. And in regard that when Ships did come up to the Port of *London*, there uſed to be very great Frauds committed by a promiſcuous kind of ſhipping and landing of Goods and Merchandizes at ſeveral blind or unknown Wharfs and Keys, by reaſon of which his Majeſty was often defeated of his Cuſtoms, it was provided that a Commiſſion might iſſue forth out of the *Exchequer* to aſcertain all ſuch Wharfs, Keys, or other places as his Majeſty by virtue of ſuch Commiſſion ſhould appoint, in purſuance of which his Majeſty hath been pleaſed to allow to be lawful Keys, Wharfs, and other places for the lading or landing of Goods.

Brewers Key. *Cheſters Key.* *Wooll Dock.* * *Cuſtom-houſe. Key.*	* Some Stairs on the Weſt ſide thereof are declared not to be a place for ſhipping or landing of Goods.
Porters Key. *Bear Key.* † *Sabbs Dock.*	† Excluding the Stairs there, which are declared no lawful place for ſhipping or landing of Goods and Merchandize.
Wiggons Key. *Youngs Key.* *Ralphs Key.* * *Dice Key.*	* The Stairs there declared unlawful for ſhipping or landing of Goods or Merchandize.
Smarts Key. † *Smarts Key.*	† The Stairs there declared no lawful place for ſhipping and landing of Goods and Merchandizes.
Lyon Key. *Butolph Wharf.* *Hamons Key.* * *Gaunts Key.*	* The Stairs on the Eaſt declared unlawful for ſhipping or landing of any Goods, &c.

Cocks

Cocks Key.	One other place betwixt *Cocks Key* and *Freſh Wharf*, called part of *Freſh Wharf*, the Stairs are declared to be unlawful for ſhipping or landing of any Goods, &c.
Freſh Wharf.	
Billingſgate.	To be a common open place for the landing or bringing in of Fiſh, Salt, Victuals, or Fuel of all ſorts, and all Native Materials for Building, and for Fruit (all manner of Grocery excepted,) and for carrying out of the ſame, and for no other Wares or Merchandize.
Bridge Houſe in Southwark.	May be allowed a place convenient for landing of any kind of Corn bought or provided for Proviſion or Victualling of the City of *London*, and not upon any private or particular Perſons account, and for no other Goods or Merchandize.

XI. It may be lawful for any Perſon to ſhip or lade into any Ship or Veſſel on the River of *Thames* bound over Seas, Horſes, Coals, Beer, ordinary Stones for Building: Fiſh taken by any of his Majeſties Subjects, Corn or Grain, the Duties being paid and Cocquets and other lawful Warrant duly paſſed for the ſame.

So likewiſe Deal-boards, Balks, and all ſorts of Maſts and Great Timber may be unſhipt and laid on Land at any place between *Lyme-houſe* and *Weſtminſter*, the Owner firſt paying or compounding for the Cuſtoms, and declaring at what place they will land them before he unſhips them, and upon Licence had, and in the preſence of an Officer they may unlade them; otherwiſe they incur a forfeiture.

CHAP. XV.

Proviſions and Allowances made notwithſtanding the ſeveral Clauſes in the Acts for the Cuſtoms.

I. Cuſtom *to be paid for no more than is landed; and when Bulk ſhall be broken.*

II. *Of Goods Imported and Exported, what of the Cuſtoms ſhall be repaid back, and by whom; and of the things requiſite in the ſame.*

III. *Of Agreement or Contracts made, or to be made for the importing and exporting by way of Compoſition, ratified.*

IV. *What Allowances to be made to the Exporters of Wines.*

V. *Of Exporting of* Spaniſh *Wooll; where the ſame may be done.*

VI. *Of Currans Exported, what Allowances ſhall be made, and to whom, as well to Denizens as Foreigners.*

VII. *Goods imported not finding Market after a year; Wine exported diſcharged of Cuſtom.*

VIII. *What Allowances are to be made for Leakage.*

IX. *What ſhall be accounted Leakage.*

X. *Wines proving unmerchantable, what allowances to be made.*

XI. Tabaccoes *receiving detriment or damage in the Importation, what allowances to be made.*

XII. *Strangers paying double Subſidy, where they ſhall pay Double Cuſtom.*

XIII. *Of times and places lawful to unlade, and Officers duties then attendant to be preſent.*

XIV. York, New-Caſtle, *and* Hull *Men were Cuſtom-free, and for what.*

XV. Exeter *and other* Weſtern *Men, what free Subſidies ſhall be allowed in.*

XVI. *Woollen, whether new or old, what allowances ſhall be made in Cuſtom or Subſidy.*

XVII. *Allowances of* 5. *in the Hundred for all other Goods.*

XVIII. *The Cuſtomers and other Officers Duties in reference to attend their ſeveral Duties in the Cuſtoms.*

XIX. *Of Officers their Duties, and the Puniſhment where made on complaint.*

XX. *The ſeveral Duties of* London *how preſerved.*

XXI. *The like for other Cities for thoſe Duties granted or taken for publick good uſes.*

XXII. *Where Ships may be viſited and the Officers duty relating to the ſame.*

XXIII. *Timber to be rated, and in what manner muſt pay.*

XXIV. *Prevention in Extortion of Cuſtomers and Officers, and on what pains and penalties.*

XXV. *Where Fees for Cocquets and Certificates ſhall be paid all together, and where he ſhall*

ſhall not detain his own Cocquet till the Veſſel has broke ground.

XXVI. *Where the Officers and Cuſtomers ſhall allow and make good to the Merchants the* Algier *Duty and all other allowances, and no other Impoſition or Duty required by the Book of Rates, ſhall be required to be paid.*

XXVII. *If Goods ſhall happen to be taken by Enemies or Pirates, or wreck'd, and what allowances ſhall be paid.*

XXVIII. *Ships of War and other priviledged Veſſels ſubject to ſearch.*

XXIX. *Of Allowances to be made, and of ſhipping out leſſer quantities than are contained in the Certificate, what operation the ſame have.*

EVery Merchant ſhall have free Liberty to break Bulk in any Port allowed by Law, and to pay Cuſtom and Subſidy for no more than he ſhall enter and land; Provided that the Maſter or Purſer of every ſuch Ships ſhall firſt make declaration upon Oath before any two Principal Officers of the Port of the true Contents of his Ships lading, and ſhall likewiſe after declare upon his Oath, before the *Cuſtomer*, *Collector*, *Comptroller*, *Surveyor*, or any two of them at the next Port of this Kingdom, where his Ship ſhall arrive, the Quantity and Quality of the Goods landed at the other Port where Bulk was firſt broken, and to whom they did belong

Vide Cap. 14. What are lawful places of landing.

A Merchant brought eighty Tun of Bay-Salt by Sea to a Port in *England*, and out of that Ship ſold twenty Tun, and diſcharged the ſame into another Ship then riding at the ſame *Port*, but the twenty Tun were never actually put on ſhore, and for the reſt, being ſixty Tun, the Maſter agreed for the *Cuſtoms* and put them on land; and although that that twenty Tun was always water-born, and never were put on ſhore, yet adjudged they ought to pay; the reaſon was, for the diſcharging them out of the Ship, amounts as much as to the laying them on Land, the ſame being done in Port; for otherwiſe the King would meerly be defrauded. But if a Ship is carried in by ſtorm, and to preſerve the Veſſel part is landed before the Duty paid, yet this will not ſubject the ſame to a forfeiture.

Cok. 12. part *fol.* 17, 18.

Pagaſtas's Caſe *Plowden's* Com. *fol.* 9.

II. All Foreign Goods and Merchandizes (except Wines, Currans, and wrought Silks) firſt Imported,

 ſhall

ſhall be again Exported by any *Engliſh* Merchant within twelve Months, and ſuch Merchant or Merchants as ſhall Export any ſuch Foreign Goods or Merchandizes (except as before is excepted) ſhall have allowance and be repaid by the Officer which received the ſame, the one moiety of the Subſidy which was paid at the firſt importation of ſuch Goods or Merchandizes, or any part thereof, ſo as due proof be firſt made by Certificate from the Officers of the due Entry and Payment of the Cuſtom and Subſidy of all ſuch Foreign Goods and Merchandizes inwards, with the Oath of the Merchants importing the ſame, affirming the truth thereof, and the name of his Majeſties Searchers, or Under-ſearcher in the Port of *London*, and of the Searcher of any other the Out-Ports, teſtifying the ſhipping thereof to be Exported; after all which duly performed in manner before expreſſed, the moiety of the Subſidy firſt paid inwards, ſhall without any delay or reward be repaid unto ſuch Merchant or Merchants who do export ſuch Goods and Merchandizes, within one Month after demand thereof, as alſo the whole additional Duty of *Silk*, *Linen*, and *Tabacco*, as before is directed.

Lutw. 215, 221. 1 *H.* 7. If the Officer ſhall refuſe to pay, (admitting there was no relief had by way of complaint) whether the Merchant Exporter may not bring an Action againſt him upon the Debt created in Law, as he that hath a Tally may do *

* *Hobart* 270. Rolls Abridg. 599.

III. And if there be any Agreement now in force, which was formerly made by the late Commiſſioners of the Cuſtoms and Sbſidies, with the Merchants Strangers or their Factors, or ſhall hereafter be made by any Commiſſioners or Farmers of the Cuſtoms and Subſidies, or any other Power, (except by conſent of Parliament) with any Merchant or Merchants Strangers or Factors for any Foreign Goods and Merchandizes, to be brought into the Port of *London*, or any other Port or Haven of this Kingdom of *England*, or Principality of *Wales*, and to be Exported again by way of Compoſition; all other Merchants being his Majeſties Subjects ſhall be admitted

mitted into the ſame Compoſition, and not be excluded from any other Priviledge whatſoever granted to the Stranger by any private Agreement or Compoſition, under the ſame condition and with the ſame reſtriction as ſhall be made with the Merchant Stranger.

IV. Every Merchant as well *Engliſh* as Strangers, that ſhall ſhip and export any kind of Wines, which formerly have paid all the Duties of Tunnage inwards, ſhall have paid and allowed unto them all the Duties of Tunnage paid inward, except to the *Engliſhmen* 20 *s per* Tun, and the Stranger 25 *s. per* Tun; upon due proof of the due Entry and Payment of Tunnage inwards, and of the ſhipping thereof to be Exported to be made as above.

V. If any Merchant, Denizen, or Stranger ſhall Export any *Spaniſh* or Foreign *Wooll*, he ſhall have liberty ſo to do with this further Condition, That ſuch *Spaniſh* or other Foreign *Wools* whatſoever be not Exported in any other Ship or Veſſel whatſoever, with intent to be arrived beyond the Seas out of the Kingdom of *England* and Dominion of *Wales*, than only in *Engliſh* Shipping, upon pain of Confiſcation. 12 *Car.* 2. *c.* 32. 14 *Car.* 2. *c.* 18.

VI. Every Merchant, as well *Engliſh* as Stranger, which ſhall ſhip or Export any Currans which formerly were duly entred, and paid the Subſidy and Cuſtom inwards, ſhall have allowed and repaid unto them reſpectively all the Cuſtom and Subſidy paid inwards for the ſame, except 1 *s.* 6 *d.* for every Hundred weight to the *Engliſh*, and 1 *s.* 8 *d.* and one halfpenny for every Hundred weight to the Stranger, upon due proof of the due Entry, and payment of the Cuſtom and Subſidy thereof inwards, and of the ſhipping thereof to be Exported to be made as in the ſecond Article.

VII. If any Merchant having duly paid all Duties inwards for Foreign Goods, and in regard of bad ſale ſhall be enforced to keep the ſame, or any part thereof in his hands, after the ſpace of a year ſhall be elapſed; in this caſe he or any other Perſon is to be permitted to ſhip the ſame out for parts beyond

the Seas, if they think fit, without payment for any Subſidy for the ſame outwards, upon due proof that the ſame was duly entred, and Subſidy paid inward.

VIII. Every Merchant bringing in any ſort of Wines into this Kingdom by way of Merchandize, and ſhall make due Entries of the ſame in the Cuſtom-Houſe, ſhall be allowed 12 *per Cent.* for Leakage.

IX. Every Hogſhead of Wine which ſhall be run out, and not full ſeven inches, ſhall be accounted for ours, and the Merchant to pay no Subſidy for the ſame.

Fayce verſ. Cole ſen & Cole jun. Hill. 27 Car. 2 in B. R.

And by ſome its conceived that no Freight ſhall be paid for the ſame, but the Merchant may fling them up to the Maſter for Freight; but that ſhould ſeem hard, for *non conſtat* any fault in the Maſter, but the ſame may be in the Casks, or in the ill ſtowing (the Maſter by Cuſtom having no charge of the ſtowing of Wines, eſpecially *French*, but the ſame belongs to certain Officers beyond Seas from whence they are imported) beſides the *Goods*, be they empty or full, take up Tunnage in his Ship, and ſhould all the Wines on ſhipboard have the ſame misfortune, it would ſeem hard; however, it is pity Opinion in this caſe ſhould amount to a laudable Cuſtom.

X. If any Wines ſhall prove corrupt and unmerchantable, and fit for nothing but to diſtil into hot Waters or to make Vinegar, then every Owner of ſuch Wines ſhall be abated in the Subſidy according to ſuch his Damages in thoſe Wines, by the diſcretion of the Collectors of the Cuſtoms and one of the Principal Officers.

XI. If any *Tobacco* or other *Goods* or *Merchandizes* brought into this Kingdom ſhall receive any damage by ſalt Water or otherwiſe, ſo that the Owner thereof ſhall be prejudiced in the ſale of ſuch Goods, the principal Officers of the Cuſtom-houſe, or any two of them, whereof the Collector for the time being to be one, ſhall have power to chuſe two indifferent Merchants experienced in the values of ſuch Goods, who upon viſiting of ſuch Goods, ſhall certifie and declare upon their Corporal Oaths firſt adminiſtred by the ſaid Officers, what damage ſuch Goods

There is a Book at the *Cuſtom-houſe*, in which there is a general value ſet on all Goods.

Goods have received, and are leſſened in their true Value; and according to ſuch damage in relation to the Rates ſet on them in the Book of Values, the Officers are to make a proportionable abatement unto the Merchant or Owner of the Subſidy due for the ſame. among which Tobacco is there valued.

XII. All Merchants Strangers who according to the rates and values ſet in the general Book of Values and Rates, and do pay double Subſidy for Lead, Tin, Woollen Cloth, ſhall alſo pay double Cuſtom for Native Manufactures of *Wool*; and the ſaid Strangers are to pay for all other Goods as well inwards as outwards, rated to pay the Subſidy of Poundage, three pence in the ponnd, or any other Duty payable by *Charta Mercatoria*, beſides the Subſidy. Nor can ſuch Merchants Strangers land their Goods before they have agreed for the Cuſtoms, notwithſtanding *Charta Mercatoria*.

XIII. That the Merchants Trading into the Port of *London*, have free liberty to lade and unlade their Goods at any lawful Keys and places of ſhipping * and lading Goods between the *Tower* of *London* and *London* Bridge, and between Sun-riſing and Sun-ſetting from the Tenth day of *September* to the Tenth day of *March*; and between the hour of ſix of the Clock in the Morning, and ſix of the Clock in the Evening, from the Tenth day of *March* to the Tenth of *September*, giving notice thereof to the reſpective Officers appointed to attend the lading and unlading of Goods; and ſuch Officer as ſhall refuſe upon due calling to be preſent, he ſhall forfeit for every default 5 *l.* the one moiety to the King, the other to the Party aggrieved, he ſuing for the ſame. * *Vide lib.* 3. *cap.* 14. § 10.

XIV. The Merchants of *York*, *Kingſton upon Hull*, and *New-Caſtle upon Tyne*, and the Members thereof, ſhall be allowed free Cuſtom and Subſidy two of the *Northern* Clothes and Kerſies in ten to be ſhipped in thoſe Ports in the name of *Double Wrappers*, as formerly has been there allowed them.

XV. The Merchants of *Exeter* and other Weſtern parts ſhall be allowed free of Subſidies one *Perpetanae* in Ten for a *Wrapper*, and three *Devons Dozens* in Twenty for *Wrappers*, the ſame to be ſhipped out of the Ports of *Exeter*, *Plymouth*, *Dartmouth*, *Barnſtable*,

ſtable, *Lyme Regis*, or the Members thereof.

Note, That all theſe ſeveral allowances are not by Act of *Parliament*, but purely his Majeſties gracious and voluntary gift and benignity towards the encouraging the Merchants and Trade.

XVI. All Merchants tranſporting any ſort of *Woollen*, whether new or old Drapery, as alſo all *Bays* and *Cottons*, ſhall be allowed one in ten for a Wrapper free of Cuſtom and Subſidy.

XVII. Every Merchant ſhall be allowed upon all other Goods and Merchandize appointed to pay to any the Subſidy of Poundage according to the Rate in the Book of Values, to be imported 5 in the Hundreded of all the ſaid Subſidies of Poundage ſo appointed to be paid.

XVIII. The Officers who ſit above in the Cuſtom-houſe of the Port of *London*, ſhall attend the ſervice of their ſeveral places from nine to twelve in the Forenoon, and one Officer, or one able Clerk, ſhall attend with the Book in the Afternoon, during ſuch time as the Officers are appointed to wait at the Water-ſide, for the better deciding of all Controverſies that may happen concerning Merchants Warrants, all other the Officers of the Out-Ports ſhall attend every day in the Cuſtom-houſe of every reſpective Port for diſpatch of Merchants and Ships, between the hours of nine and twelve; and two and four in the Afternoon.

XIX. Every Merchant making an Entry of Goods either inwards or outwards, ſhall be diſpatched in ſuch order as he cometh; and if any Officer or his Clerk, ſhall either for favour or reward put any Merchant or his Servant duly attending and making his Entries as aforeſaid, to draw any other Reward or Gratuity from him than is limited in the Act of *Tunnage* and *Poundage*, and the general Book of Values, if the Maſter Officer be found faulty herein, he ſhall upon complaint to the Chief Officers of the Cuſtom-houſe be ſtrictly admoniſhed of his Duty; but if the Clerk be found faulty therein, he ſhall upon complaint to the ſaid chief-Officers be preſently diſcharged of his Service, and not permitted to ſit any more in the Cuſtom-houſe.

XX. The Lord Mayor, Commonalty, and Citizens of the City of *London*, their Officers, or Deputies for and touching Officers of *Package*, *Scavage*, *Baleage*

Baleage or *Portage* of any Goods or Merchandize of Aliens, or their Sons born within this Kingdom or unfreemen, Imported or Exported into or out of the City of *London* or the Liberties or Ports thereof unto or from the parts beyond the Seas, for or concerning the receiving or taking of any Fee or Rates heretofore uſually taken, for or in reſpect of the ſaid Offices, or any of them, might and may receive and take the ſame, any thing in the ACT of Tunnage and Poundage, or any other Act or thing to the contrary notwithſtanding.

XXI. All ancient Duties heretofore lawfully taken by any City or Town Corporate, their Farmers, Deputies or Officers, under the name of Town-Cuſtom, or the like, for the maintenance, of Bridges, Keys, Harbours, Wharfs, or the like, ſhall and may be received and enjoyed as formerly, any thing in the ſaid Act, or any other Act to the contrary in any wiſe *non obſtante*.

XXII. The Under-Searcher or other Officers of *Graveſend* have power to viſit and ſearch any Ship outward bound, but ſhall not without juſt and reaſonable cauſe detain any Ship under colour of ſearching the Goods therein laden above three Tides after her arrival at *Graveſend*, under pain of loſs of their Office, and rendring damage to the Merchant and Owner of the Ship, and the Searcher or Officer of the Cuſtom-houſe in any of the out-Ports having power to ſearch and viſit any Ship outward bound, ſhall not without juſt and reaſonable cauſe detain ſuch Ship, under colour of ſearching the Goods therein laden, above one Tide after the ſaid Ship is fully laden and ready to ſet ſail, under pain of loſs of the Office of ſuch Offender, and rendring damage to the Merchant and Owner of the Ship.

XXIII. All Timber in Balks which ſhall be of 8 inches ſquare and upwards, that ſhall be imported or brought from any part beyond the Seas into the Realm of *England*, Dominion of *Wales*, Port and Town of *Berwick*, or any of them, ſhall be rated according to the meaſure of Timber, the foot ſquare 3 *d.* for the value thereof, and according to that

rate

rate ſhall pay for Subſidy 12 *d.* in the pound accor-ding to Poundage; and all under 8 inches ſquare, and above 5 inches ſquare, ſhall pay for Subſidy according to the rates mentioned in the Book of Rates for middle Balks, and all of 5 inches ſquare or under, ſhall pay according to the rate of ſmall Balks.

XXIV. For avoiding of all oppreſſions by any the Officers of the Cuſtoms in any Port of this Kingdom, in exacting unreaſonable Fees from the Merchant, by reaſon of any Entries or otherwiſe touching the ſhipping or unſhipping of any Goods, Wares or Merchandize, it is ordered that no Officer, Clerk, or other, belonging to any Cuſtom-houſe whatſoever, ſhall exact, require, or receive any other or greater Fees of any Merchant or other whatſoever, than ſuch as are or ſhall be eſtabliſhed by the Commons in Parliament aſſembled; and if any Officer or other offend contrary to this *Order*, he ſhall forfeit his Office and Place, and be for ever uncapable of any Office in the Cuſtom-houſe.

XXV. All Fees appointed to be paid unto the *Cuſtomer*, *Comptroller*, *Surveyor*, or *Surveyor General* in the Port of *London*, for any Cocquets or Certificate outwards, ſhall be paid altogether in one ſumm, to that *Officer* from whom the Merchant is to have his Cocquet or Certificate above in the Cuſtom-houſe; and after the Merchant hath duly paid his Cuſtom and Subſidy, and other Duties above in the Cuſtom-houſe, as is appointed above by the Book of Rates, he is to be Maſter of and keep his own Cocquet or Certificate, until he ſhall ſhip out his Goods ſo entred, whereas he is to deliver the ſame to the *Head Searcher*, or his Majeſties *UnderSearcher* in the Port of *London* or other *Ports*, together with the Mark and Number of his Goods.

XXVI. The *Officers* of the Cuſtom-houſe for the time being, ſhall allow and make unto all Perſons all ſuch Monies as are, or ſhall be due unto them for the half Subſidy, and alſo the *Algier* Duty of Foreign Goods formerly exported now due and unpaid.

The Duties and Sums of Money appointed to be paid by the Act of Tunnage and Poundage paſſed this

his Parliament, and by the Book of Rates therein nentioned, and no other ſhall be paid to his Majeſties *Officers* during the continuance of the ſaid Act upon Goods imported and exported, any Law, Statute, or Uſage to the contrary notwithſtanding. Nevertheleſs he duty of *Prizage* and *Butlerage*, and the duty of 12 *d.* of every Chaldron of Sea-coal exported from *New-Caſtle* upon *Tyne* to any other Port or Ports of his Realm ſhall be continued.

XXVII. If any Merchant Denizen born ſhall happen to have his Goods and Merchandize taken by Enemies or Pirates at Sea, or periſhed in any Ship or Ships, the Duties being either paid or agreed for, upon due proof thereof, may ſhip out of the ſame Port the like quantity as ſhall amount unto the Cuſtom without paying of any thing for the ſame. 27 *Ed.* 3. *cap.* 13. 12 *Car.* 2. *cap.* 4.

If the Importer ſhall pay ready Money, he ſhall be allowed 10 per Cent. *for ſo much as he ſhall pay down.*

XXVIII. Ships of War may be entred and ſearched for prohibited and unaccuſtomed Goods, and to bring them aſhore to the King's Ware-houſes, and the Commiſſioners or Head-Officers may leave aboard Officers to look after them, that none be unladen or imbezelled, on pain of forfeiture of 100 *l.* And if Goods are concealed on ſhipboard after ſuch time as the Ship is cleared, to forfeit 100 *l.* and then any with a Writ of Aſſiſtance out of the Court of *Exchequer* to go in the day-time to any place, and enter and ſeize. 14 *Car.* 2. *c.* 11.

Goods conveyed ſecretly into Ships, and carried away without paying the Subſidy and Duties, the Owners and Proprietors forfeit the double value, except Coals, which only forfeit the double Cuſtom and Duty.

XXIX. There are allowances to be given Merchants for defective and damaged Goods of 5 *per Cent.* on all Goods imported, and 12 *per Cent.* on all Wines to be allowed upon Debentures; but if they ſhall ſhip out leſs than is in the Certificate, then the Goods therein mentioned, or the value thereof ſhall be forfeited, and the Owner or Merchant ſhall loſe the benefit

benefit of receiving back any of the Subſidy: And Goods ſhipped out are not to be landed again in *England*, on pain of forfeiture of thoſe Goods.

All Goods coming out of, or carried into *Scotland* by Land, ſhall paſs through *Berwick* or *Carliſle*, and pay Cuſtom as others, on pain of forfeiture.

And although that by this Act there are many allowances to be made, eſpecially Merchants-Denizens, yet the Parliament have ever been ſo careful as to bound the ſame, that is, it ſhall be ſuch who traffick in Ships; (which are indeed the Bulwark of this Iſle) and therefore if ſuch Merchandize ſhall be tranſported out in any Galley or Carack, they are obliged to pay all manner of Cuſtoms, and all manner of Subſidies, as any Alien; but in regard that Herring and Fiſh are, and have been accounted one of the principal Commodities, and generally finds a Vent or Market in thoſe Kingdoms and Countries that uſually imploy ſuch ſort of Veſſels, thoſe Commodities may be Tranſported in them as well as Ships from any Port or Harbour within this Realm, without paying any Subſidy or Poundage for the ſame; but then ſuch Fiſh muſt be taken by the Natives of the Kingdom, and tranſported by them, otherwiſe to pay as Aliens.

And whereas all manner of *Woollen* Clothes, as well white as coloured, unrowled, unbarded, and unſhorn, and not fully dreſſed, are prohibited by Law to be tranſported, His Majeſty was graciouſly pleaſed to grant * unto *Frances* Counteſs of *Portland*, as well for her Alliance in Blood, as alſo for the many Croſſes and Calamities which ſhe hath ſuffered by the loſs and death of her neareſt Relations in his Majſty and his Royal Father's Service, full power for one and thirty years, to licence the Tranſporting of ſuch Goods *non obſtante* ſuch prohibitory Laws; the which is now put in Execution by Agreement, and the Compoſition with her Deputies at the Cuſtom-houſe.

* *Per* Letters Patents bearing Date 24 of *Feb.* 27 *Car.* 2.

CHAP.

CHAP. XVI.

f the Right of Paſſage, of impoſing on the Perſons and Goods of Strangers for paſſage through the Seas.

Of the Right of harmleſs Utility *excepted tacitly in the primitive Dominion of things.*
. *Where paſſage ought to be open, and where the ſame might be implicitly provided for in the firſt inſtitution of Property, and under what Cautions.*
II. *Of the ſame right in reference to Goods and Merchandize.*
IV. *If Paſſage addmitted, whether* Tribute *or* Toll *may be impoſed.*
V. *Where Impoſition may lawfully be laid, and for what cauſes; and of the King's Prerogative in that Point.*
VI. *Whether lawful to ſtay in others Country, and to build for a ſeaſon.*

. HAving in the foregoing three Chapters obſerved ſomewhat of *Cuſtoms* and *Impoſitions* laid *le facto* within the Realm, and that by Acts of Pariament, or the conſent of the three Eſtates, it may ot ſeem amiſs to inquire what Impoſition the King f his Prerogative may impoſe on Strangers and their Goods paſſing through his Territories and Seas; and n that to inquire of the ſame in reference to Perſons and Goods.

Beſides the right of Neceſſity which ſeems to be excepted in the firſt Inſtitution of Dominion, there is another Relique of old Communion, namely, the Right of harmleſs Utility: *For why ſhould not one* (ſaith *Cicero) when without his own detriment he may communicate to another in thoſe things that are profitable to the Receiver, and to the Giver not chargeable?* Therefore *Seneca* ſaith, *It cannot be called a benefit to give leave to another to light his Fire by yours.* We read in *Plutarch*, it is not lawful to ſpoil our Victuals when we have more than enough, nor to ſtop, nor hide a Fountain when we have drunk our fill; nor to aboliſh the Way-marks either by Sea or Land which have been uſeful to us: So a River as a River is proper to that *Prince*, or that *Lord*, *Cic. de Offic.* 1. *Sen. de Benef. A Symp.* 7.

Princes ſhall make of force in thoſe places where they have an acceſſion of Property or Sovereignty.

IV. But admitting that ſuch free Paſſage may be granted, as above, whether Tribute may be impoſed by him that rules the Land, upon Merchandize paſſing by Land or by River, or by part of the Sea, which may be called an Acceſſion of the Land, (that is, the place through which they paſs, is as much under the abſolute Juriſdiction of the Prince, as the very Land it ſelf) certainly whatſoever Burdens have no relation to the Merchandize, no equity ſuffers the ſame to be impoſed on the ſame; neither can Poll-money put on the Inhabitants to ſuſtain the charge of the Common-wealth, be exacted of Paſſengers.

Vide Strabo. *lib.* 8. *& lib.* 16.

V. Nevertheleſs, if either to ſecure the Paſſengers Goods and Veſſels from Pirates and others, or for the erecting of Beacons, Light-houſes, and other Sea-marks, and ſuch like, * there indeed ſome compenſation may be laid upon the Commodities or Ships paſſing through, ſo that the meaſure of the cauſe be not exceeded; or as my Lord *Coke* obſerves in the caſe of the Halage-money, † it be reaſonable, for upon that depends the juſtneſs of Tributes and Toll: Aud upon thoſe reaſons the *Venetian* in the *Adriatick*, the King of *Denmark* in the *Baltick* Sea does demand the ſame; and the King of *England* may do the like in the *Chambers* of his Empire, and that by his Prerogative; for the ſame is not ſo much *compulſory* to any to pay, but to them that will take *benefit* of ſuch accommodation.

* 13 *H.* 4. *fol.* 14.

† *Lib.* 5. *fol.* 63. Caſe of the Chamberlain of *London* *Vide* the Plea of the *Venetian* Lawyers at the End of Mr. *Selden's* *Mare Clauſum.*

Les Comons praiont que lou le Roy ſes Progenitors de long temps haut eſtre Seigneur de Mer, & ore eſt venus que le Roy Seigneur des Coſts de ambideux partes del Mer, & par ceo praiont le Roy de impoſer un unpoſition ſur Eſtrangers paſſant purmy la Mer.

Strabo relates, That the *Corinthians* even from the moſt ancient of times received Tribute of the Commodities, which to avoid the compaſſing of *Malta*, were carried by Land from Sea to Sea. So the *Romans* received a price for the paſſage of the *Rhyne*. But this Right of impoſing on Ships and Goods paſſing

Pereg. lib. 1. *de Jure Fiſci, cap.* 1. *num.* 27.

paſſing through ſome Territories, is found cruel, eſpecially when they muſt paſs through the Territories of a powerful and fierce People, then it is heavy to the Merchant to compound, for it's often done on hard and grievous terms.

VI. Again, to ſtay ſome time for health ſake, or for any other juſt cauſe, ought alſo to be permitted to Paſſengers, for this too is among the innoxious utility; wherefore *Illoneus* in *Virgil* * when the *Trojans* were prohibited to ſtay on the ſhore of *Africk*, is bold to invoke the Gods as Judges: And the complaint of the *Megarenſes* againſt the *Athenians*, who drave them from their Havens † *againſt common Right*, was approved by the *Greeks*; ſo that the *Lacedemonians* eſteemed no cauſe to create a War more juſt: Hence it is, that at this day it is held by all Lawyers, That it is lawful (either in caſes of Wreck, or any other exigency upon ſuch landing) for Paſſengers to build a Cottage or Hut on the Shore to ſhelter them for a ſeaſon, though we grant the Shore to be poſſeſs'd by the Inhabitants: 'Tis true, *Pomponius* does think there ought to be the Prætor's Decree; but certainly that extends only to thoſe Paſſengers that, being expulſed their own Countries, deſire perpetual habitation, and a ſubjection to the Government of the place where they deſire to dwell.

* *Servius ad eum loc.*

† *Plutarch Pericle.*

Occupantis enim eſt poſſeſſi littoris unde oſtenduntur crudeles qui etiam a communibus probibeant.

The End of the Second Book.

BOOK III.

CHAP. I.

Of Freedom, Bondage, Slavery, Exile, and Abjuration.

I. *Of freedom by the Law of Nature, and of Bondage, Slavery, or Captivity introduced by the Law of Nations.*
II. *Of the Actions that ſubject Man to Bondage.*
III. *Of the Dominion over Slaves, Bond-men and Captives.*
IV. *Of the Cauſe, or Reaſon of ſuch Dominion.*
V. *That this Right or Dominion was not a Law univerſal.*
VI. *Of Bondage or Slavery, where diſcontinued by the Chriſtians and Mahometans.*
VII. *Of a Servitude at this day ſtanding with the Laws of a Chriſtian Common wealth.*
VIII. *Of Manumiſſion and Freedom by the* Hebrew *and* Roman *Law, and by the Law of* England.
IX. *Of Disfranchiſing the ſeveral ways.*
X. *Of Abjuration and Exile, and what operation it hath.*
XI. *Of Freedom in Cities and Corporations in reference to Merchants, Traders and Forreigners.*

L. libert §. 1. D. de ſtatu hominum. Fiunt etiam ſervi liberi homines captivitate de jure gentium. Bracton l. 1. c. 6.

I. IN the primitive ſtate of *Nature*, no Men were Servants; yet it is not repugnant to natural Juſtice, that by the Fact of Man, that is, by *Covenant* or *Tranſgreſſion*, Servitude ſhould come in; therefore Servitude is brought in by the *Laws of Nations.*

Littleton §. 175. l. Poſtlim. §. 1. D. de Captiv.

II. Hence it is, That thoſe that will yield up their perſons, or *promiſe* Servitude, are accounted *Slaves*; ſo likewiſe all that are *taken in Publick War*, and brought within the Guards of their Conquerors; nor is tranſgreſſion neceſſary, but the Lot of all is equal after the War is begun, even thoſe whoſe ill fortune ſubjected them to be deprehended within the Enemies bounds; nor are they Servants only themſelves, but all their Poſterity for ever.

III. The

III. The Priviledges of this *Right* or *Dominion* are infinite; *ſince there is no ſuffering which may not be impoſed on ſuch, nor work which may not every way be extorted from them:* So that even the Cruelty of Maſters became almoſt unpuniſhed, till the Municipal Laws of Countries ſet bounds to their rigour and power.

L. & ſervorum §. 1. D de ſtatu hominum. Apud omnes peraq; gentes, ait Caius Animadvertere poſſumus dominis in ſervos vitæ neciſq; poteſtatem fuiſſe. Co. Inſtit. fol. 116. b. l. 1. D. de his qui ſunt juri.

Nor are the Perſons become theirs only that have the power of them, but alſo all that they have; for ſuch unhappy Perſons *can have nothing of their own.*

Hence it was, That that excellent Law in favour of ſuch, was introduced by the *Romans*, called * *Lex Cornelia*, which was when a Captive, *intra præſidia hoſtium*, died in his Captivity; if he had made a Will, before his being taken Captive, yet ſuch a Captive ſhould in favour of ſuch Will, and for the upholding of the ſame, be feigned to be dead, and *in puncto temporis*, immediately before ſuch his being taken Captive; and ſo by that Legal Fiction of death, this Will became firm and valid, as if he had really died without ever being taken by the Enemy. So likewiſe if one had been made a Slave; yet if he had returned out of his Captivity, that for the preſervation of his Right and Propriety, he was feigned as if he had never been abſent, and was immediately redintegrated into his priſtine ſtate and condition.

* *Leg. Cornel. ff. de Teſtam. & Leg. Cornel ff. de vulg. ſubſtit.*

In jure Poſtliminii. leg. retor. & l. in bel'o §. 1 & l. bon. ff d. Capt. & § 4. D. quibus mod. jus patr. ſolvit.

IV. Now all theſe Privileges and Immunities were introduced by the *Laws of Nations*, for no other reaſon, but that their Captors, taken by ſo many Immunities, *might willingly abſtain from that cruel rigour of ſlaying their Priſoner.*

Hence it is, That the Captor's Dominion is extended to the Children; for ſhould ſuch *uſe their higheſt Right, they would not be born*; but Children that are born before that calamity, and were never taken Priſoners, are freed from that unhappy ſtate.

And Forteſcue conceives, it began *ab homine, & pro vita introducta eſt ſervitus, E. ſed libertas à Deo hominis indita eſt natura, quare ipſa ab homine ſublata ſemper redire gliſcit ut faciat omne quo libertate naturali privatur*, cap. 42.

V. Though this Dominion or Right was generally acquired in moſt Nations, yet was not the ſame an *univerſal Law*; for amongſt the *Jews*, refuge was granted to Servants who fell into that calamity by no fault of their own. And the ſtate of *Chriſtendom* at this day is apparent, That Priſoners taken in War do not become perfect Slaves, as of old, but only remain in the cuſtody of the Captor, till *Ranſoms are paid*, whoſe valuations are generally at the *pleaſure* of the Conqueror; yet Perſons of Eminent Quality, as *Generals*, and the like, ſuch perſons, * if taken by a common Soldier, yet he has no advantage by the ſame; for ſuch a Captive is become Priſoner immediately to that Prince or State under whom the Captor ſerved: But if it be the lot of an *inferior Soldier* to become a Priſoner of War, he is then become abſolutely the Captors to diſpoſe of; but he wanting thoſe Neceſſaries in the Field for himſelf, which he ought to provide for his Priſoner, commonly waves that intereſt, and generally yields him up as a Priſoner of War to be diſpoſed of by that Prince or State under whom he ſerves.

* Artic. of War *Anno* 1673. for his Majeſties Forces, *Artic.* 24

Bart. in l. nam. & ſerv. D. de rebus geſtis.

VI. Slavery in *Chriſtendom* is now become obſolete; and in theſe latter Ages the minds of Princes and States having as it were univerſally agreed to eſteem the words, *Slaves*, *Bondman*, or *Villain*, barbarous, and not to be uſed; and that ſuch as are taken in War between Chriſtian Princes, ſhould not become Servants, *nor be ſold, or forced to work, or otherwiſe ſubjected to ſuch ſervile things*, but remain till an exchange of Priſoners happen, or a Ranſom paid, as afore: Nay, the very *Turks* and *Mahometans* at this day generally obſerve this among themſelves, not to make Slaves of thoſe of the *Mahometan Religion*, though taken in War; and that which is moſt to be admired, a Chriſtian fallen into that miſerable ſtate, renouncing his Religion, and becoming a *Mahometan*, immediately upon his Circumciſion obtains his Freedom with a Recompence. The Cruelty of thoſe Infidels to thoſe unhappy Perſons, together with the reward of renouncing, hath given cauſe to many a brave Perſon to become *Renegado*; the which

In the Wars of the *French* with the *Spaniards* in *Italy*, a Horſeman was ranſomed for the 4*th* of his yearly Pay. *Vide Mariana* l. 27. c. 18. And in the laſt *Belgick* War, the *Engliſh* diſmiſt all the *Flemings* that were taken in

which being conſidered by the Parliament of *England*, they made a † proviſion for ſuch miſerable Perſons as ſhould be taken by *Turkiſh* and *Mooriſh Pirates*. War, as they did the like with thoſe of *England*.

Anno 167⅔. *Quam non ſit ardua virtus ſervitium fugiſſe manu*, it is none of the hardeſt Vertues to embrace Death to avoid Slavery † 16, 17 *Car.* 2. *cap.* 24. its expired; but his Majeſty is yet graciouſly pleaſed to conſider the ſtate of his poor Subjects, and thereupon hath appointed a Committee of the Lords of the Privy-Council, for the managing of that Affair.

VII. Though *Slavery* and *Bondage* are now become diſcontinued in moſt parts of *Chriſtendom*, and to that degree, that for the Perſon of a Man, be he *Moor* or other *Indian*, a Trover is not maintainable by the Laws of *England*; yet there may be a Servitude which may amount to a labour or ſuffering *equal* to that of Captives, the which may be juſtifiable; for Men either through poverty, and the * like, may oblige themſelves by Contract for maintenance to a Servitude that's perpetual, *i. e.* for life, and ſo for years; but at this day there is no Contract of the Anceſtor can oblige his Poſterity to an hereditary ſervice; nor can ſuch as accept thoſe Servants, exerciſe the ancient Right or Dominion over them, no nor ſo much as to uſe an extraordinary rigour, without ſubjecting themſelves to the Law. If an Eye or a Tooth had beeen ſtruck out injuriouſly, by the *Hebrew Law* Freedom was immediately due; and by the *Greeks*, if Servants had been ill treated, it was lawful for them to demand *a ſale of themſelves to others*. At *Rome* the Statutes became Sanctuaries for Servants to implore the help of the Governours againſt rigour, hunger, or any other intolerable injury inflicted by their Maſters; and even in *London* at this day in *Servitude* (amongſt the many cauſes, as not Inrollment of the Indentures, not inſtructing in the Art, want of Neceſſaries, *infra ætatem* 14, &c.) Cruelty, Hunger, Rigour, immoderate Correction, and the like, are cauſes ſufficient on a *Monſtrance* or Petition to the Lord Mayor and Aldermen to diſſolve the Contract, though under Hand and Seal, and to decree all or part of the Dowry, or ſome given (if any) to the Servant; and if cruelty hath

Salk. 656, 667.

* The *Engliſh* Merchants and others, at the *Canaries*, do here ſupport this unnatural Cuſtom: So likewiſe at *Virginia*, and other Plantations.

Exod. 21. 26. 27.

Vide the Statute of 5 *Eliz.* who hath provided the like remedy in other places.

been in the caſe, to expoſe the Maſter to anſwer da-mage to the party Servant.

VIII. *Ulpianus* obſerves after, That by the Laws of Nations Servitude came in, then followed the benefit of Manumiſſion. By the *Hebrew Law*, after the expiration of the time agreed on, the Servant was to be manumitted, and that not without Gifts like *London*'s Freedom; by the Cuſtom of which the Maſter is always at the charge of Cloathing, and diſcharging the Chamberlain's Fees. By the *Roman Law*, every Son was in ſuch ſubjection to his Father, that before he could be releaſed of this Subjection, and made Free, he ſhould by an imaginary ſale be ſold three times by his natural Father to another Man, who was called by the Lawyers *Pater Fiduciarius*, that is, a Father in Truſt, and then be bought again by his natural Father, and ſo manumitted by him, and then he became Free: This Form of ſetting Free was by them called *Emancipatio* Freedom

Deut. 15. 13.

The *Ruſſians* having ſeized on the Country of *Illyria*, and made it their own by Conqueſt, their Victory pleaſed them ſo highly, that thereupon they called themſelves by a new name, *Slave*, which is in their Language, *Glorious*; but in after time, (that warmer Climate having thawed their Northern hardneſs, and not ripned their Wits) when they were conquered, the *Italians* in deriſion call them (being then their Bond-men) Slaves, Sir *Walter Rawleigh, lib.* 2 *cap.* 17. §. 8.

Vide leg. 12. *Tabul. Sigonius de jure Roman.* **Juſtin. Inſtit. lib.* 1 *tit. de Ingen. Vid. Franc. Silo in Catilin art.* 4.

That *Roman Darling* was to be obtained three ways; 1. By *Birth*, * both, or at leaſt one of their Parents being Free, and ſuch were called *Cives Originarii*.

2. By *Gift* and *Cooptation*, when the Freedom was beſtowed on any Stranger or Nation, and then they were termed *Civitati Donati*: And ſo we read that *Cæſar* took in whole Nations into the Freedom.

Laſtly, by *Manumiſſion*, which was thus: When as the Servant was preſented by his Maſter before the *Conſul* or *Prætor*, the Maſter laying his hand upon his Servant's Head, uſed this form of words, *Hunc liberum eſſe volo*; and with that turning his Servant round, and giving him a Cuff on the Ear, he did *emittere ſervum è manu*: The *Prætor* laying then a certain Wand or Rod, called *Vindicta*, upon the Servant's head, replied in this manner, *Dico eum liberum eſſe more Quiritum*, then the *Lictor* or *Serjeant* taking the

Goodwyn Antiq. Rom. 4. 3, 31.

Wand,

Vand, did ſtrike the Servant on the head, and with his hand ſtruck him on the face, and gave him a puſh on the back; and after this he was Regiſtred for a *Free-man.* This being performed, the Servant having his head ſhaven purpoſely at that time, received a Cap as a Token of Liberty.

Tertullian obſerves, that at this time of their Manumiſſion, the Servants received from their Maſters a white Garment, a Gold Ring, and a new Name added to their former. *Tertullian. de reſur. Carn.*

By the *Laws* of *England* every Subject born within the King's Dominions, is a *Freeman* of this Realm, as appears by the *Grand Charter, cap.* 14. yea, though he be a *Bond-ſlave* to a Subject: † But a *Stranger* born is no *Freeman,* till the King have made him a *Denizen,* in whoſe power alone, without the help of any other, one may be made Free. *Magna Charta cap.* 14. † As to ſome things *vide poſtea* §. 9.

To be a Freeman of the Realm, the place of *Birth,* is held more conſiderable than the Quality of the *Perſon*; yet by the Opinion of *Huſſey* Chief Juſtice, and in *Calvin*'s Caſe of the *Poſt-Nati,* it is held for Law, That if *Ambaſſadors* of this Realm have Children born in *France,* or elſewhere, the Father and Mother being natural born Subjects, the Children are Free of the Realm of *England:* But if either the Father or Mother of ſuch Children were an *Alien,* then are not thoſe Children Free. 1 *Rich.* 3 *fol.* 4

But the Law is conceived to be otherwiſe at this day. The Statute *de Natis ultra mare,* 25 *E.* 3. declares the Iſſue born of an *Engliſh* Man upon an *Engliſh* Woman, ſhall be a *Denizen*; for upon the conſtruction of this Statute it has been adjudged more than once, that if an *Engliſh* Man marry a *Foreigner,* and has Iſſue by her born beyond Seas, the Iſſue is a *Natural born Subject.* *Bacon's Caſe,* 1. *Cro.* 601. *St.* 2. *cap.* 9.

If Baron and Feme *Engliſh* go beyond Sea without Licence, or tarry there after the Time limited by the Licence, and have Iſſue, that the Iſſue is an *Alien,* and not Inheritable, contrary to the Opinion of *Huſſey,* 1 R. 3. 4. *Hide* againſt *Hill.* 3 *Cro.* 3. 1 *Cro.* 602. *Steven*'s Caſe, cited in *Bacon*'s Caſe. Iſſue born beyond Sea.

An

Engliſh Merchant marries an *Alien*, and has Iſſue, he is not *Alien*. Curiam.

An *Engliſh* Merchant had Iſſue by a *Poliſh* Woman in *Poland*, and Deviſes his Copy-hold Land to the uſe of his Children, *per Crook*, The Children are not Aliens. 1. Becauſe the Father went with Licence, being a Merchant. 2. In our Law, *Partus non ſequitur Ventrem*. 3. Blood is between him and his Iſſue. Several of the Judges held that the Words in the *Stat.* 25 *Ed.* 3. *cap. De natis ultra mare*, whoſe Fathers or Mothers be or ſhall be of the Allegiance of our King, ſhall be taken diſtributive, Father or Mother, and not Copulative, *Littleton*'s *Rep.* 23, 26, 27. The King againſt *Eaton*.

IX. *Disfranchiſing* by the *Romans*, called *Capiti. diminutio*, was threefold, *Maxima*, *Media*, and *Minima*; the leaſt degree was, when the *Cenſors* pulled a Man from a higher Tribe down to a lower, and leſs Honourable; or when by any *Cenſure* they diſabled a Man from ſuffraging or giving his Voice in the publick Aſſemblies; ſuch as were thus in the laſt manner puniſhed, were termed *Ærarii*, and *in ærariis veluti, quia omnia alia jura Civium Romanorum præterquam tributi & æris conferendi amiſerunt. Gellius* relates,

*A.Gellius Noct. Attic.l.*3.*c.*17.

That *P. Scipio Naſica* and *M. Pompilius*, being *Cenſors*, taking a view of the *Roman* Knights, obſerved one of them to be mounted on a lean ſtarvling Horſe, himſelf being exceeding fat; whereupon they demanded the reaſon, why his Horſe was ſo lean, himſelf being ſo fat? His Anſwer was, *Quoniam ego, inquit, me curo; equum verò ſervus.*

First granted 17 *Joh. Reg.* revived 9 *H.*3. and ſince confirmed above thirty times.

By the Ancient Laws of *England*, and by the *Great Charter*, no *Freeman* ſhall be taken or impriſoned, but by the lawful Judgment of his Peers (that is, by Jury, Peers for Peers, ordinary Juries for others who are their Peers) or by the Law of the Land; which is always underſtood by due proceſs of the Law, and not the Law of the Land generally; for otherwiſe that would comprehend Bondmen, (whom we call Villains) who are excluded by the word *Liber*; for ſuch Bondman might be impriſoned at the pleaſure of his Lord, but a Freeman neither could nor can, without a juſt cauſe; nor does the Priviledge extend to private Actions,

or

Suits betweeen Subject and Subject, but even be-
ween the Sovereign and the Subject. Hence it is,
at if a Peer of the Realm be Arraigned at the
rit of the King for a Murder, he ſhall be tryed by
s * Peers, that is, by the Nobles. But if he be
ppealed of Murder upon the proſecution of a Sub-
ct, his Tryal ſhall be by an ordinary Jury of twelve
reeholders; and as the *Grand Charter* did, and does
rotect the Perſons of Freemen, ſo likewiſe their
ree-hold: For by the ſame *Charter* it is declared,
hat the King, or his Miniſters, ſhall out no Man
f his Free-hold without reaſonable Judgment; and
c it was rul'd upon a Petition in Parliament, ſet-
ing forth, that a Writ under the Privy Seal, went
o the Guardian of the Great Seal, to cauſe Lands
to be ſeized into the King's Hands, and that there-
upon a Writ iſſued forth to the Eſcheater, to ſeize
againſt the form of the *Great Charter*; upon debate
of which, the Party had Judgment to be reſtored:
The greateſt and moſt Explanatory Act, which ſuc-
ceeded in point of Confirmation, was that of *Edward*
the Third, the words are, **That no Man of what Eſtate or Condition ſoever he be, ſhall be put out of the Lands and Tenements, nor taken or impriſoned, nor diſinherited, nor put to death, without he be brought to anſwer by due proceſs of the Law, that is, by the Common Law.**

* The Lord *Morly* and *Monteagle's* Caſe for the ſuppoſed Murder of one *Haſtings*, 15 *Car.* 2. 10 *E.* 4. 6. 33 *Hen.* 8. *Bro.* title, Tryals.

8 *Ed.* 3. *Rot. Parl. m.* 7.

28 *E.* 3. *cap.* 3.

2. *Diminutio media*, was an Exilement out of the City, without the loſs of ones Freedom; the words of the Judgment or Sentence were, *Tibi aquæ & igni interdico.*

3. *Diminutio maxima*, was the loſs both of the City and the Freedom, and by his Judgment or Sentence was obliged and limited to one peculiar Country, all other places in general being forbidden him.

There was a fourth kind of Baniſhment, Disfranchiſing, called *Relegatio*; which was the Exilement only for a ſeaſon, as that of *Ovid's*,

Adde quod edictum quamvis immite minaxque,
Attamen in pœnæ nomine lene fuit:
Quippe relegatus, non exul dicor in illo.

Ovid. de Triſt. lib. 2.

The

The Laws of *England* in this matter have ſome reſemblance with thoſe of the *Romans*; for *Bracton*, obſerves four Diſtinctions.

1. *Specialis, hoc eſt, interdictio talis Provinciæ, Civitatis, Burgi aut Villæ.*

2. *Generalis, Interdicto totius* Regni, *& aliquando ...*

3. *Temporaria, pro* duobus, tribus, quatuor, *aut* pluribus annis, *aut*, &c.——

4. *Perpetua, pro* termino vitæ, *& exilium eſt aliquando ex arbitrio Principis, ſicut in exiliando Duces* Hertfordiæ *&* Norfolciæ, *per Regem* Richardum *Secundum, & aliquando per Judicium Terræ, ut fit in caſu* Piers *de* Gaveſton, *& etiam in caſu* Hugonis *de le* Spencer *Junioris, & ambo fuerunt exilit' per Judicium in* Parliamento. So likewiſe was that of the Baniſhment of the Earl of *Clarendon*, who dyed beyond Sea *.

In *London* the ſame is done by exhibiting an Information in the name of the Common Serjeant, in the Mayors Court there againſt any Citizen that ſhall juſtly deſerve ſo great a diſhonour.

* 17 *Car.* 2 c. 2.

X. *Abjuration* was alſo a Legal Exile, by the Judgment of *the Common Law*, as alſo by the Statute Law; and in the Statute of *Weſtm. the ſecond, cap.* 35. he that Raviſhes a Ward, and cannot render the Ward unmarried, or the value of his Marriage, muſt abjure the Realm; and this is a *general* Exile. And by the Statute made 31 *Ed.* 1. Butchers are to be abjured the Town, if they offend the fourth time, in ſelling meazled Fleſh: and this is a *ſpecial* Baniſhment.

Mr. *Selden* obſerves, That in the time of K. *Hen.* the Firſt; and of other Kings, both before and after him, that if any man accuſed of a Capital crime done at Sea, being publickly called Five times by the Voice of the Cryer, after ſo many ſeveral days aſſigned did not make his appearance in the Court of Admiralty, he was baniſhed out of *England*; *& de mere appurtenant au Royal Angleterre*, for forty years more or leſs, according to his offence. *Mar. Clauſ. fol.* 12.

A Man Exil'd does forfeit theſe things.

1. He loſeth thereby the Freedom and Liberty of the *Nation* out of which he is Exiled.

2. He forfeits his Freedom in the *Borough* or *City* where he was free; for he which forfeits the Freedom of the whole Realm, forfeits his Freedom in every part.

34 E. 1. 1 *H.* 4. 3 *Bulſt.* 188. 1 *Inſt.* 132. 133.

3. The Law accounts him as one *dead*; for his Heir may enter, and ſo may his Wife enter into her own Lands, and may ſue an Action as a *Feme ſole*.

13 *E.* 3. *Fitb. Petition pl.* 2.

4 He ſhall forfeit thoſe Lands which he ſhall purchaſe in the Realm, *during his Baniſhment*; for he du-

ring

ng his Baniſhment is as much diſabled to purchaſe
s an Alien; for *fit alienigena* by his Baniſhment, and
e is obſerved to be in a worſe condition than an Alien;
r he is marked with *indignatio Principis*. 'Tis true,
e cannot forfeit neither Title of Honour, or Knight- * *Totles Magna Charta, fol.* 50, 51.
ood, nor the Lands he had before Exile, unleſs there
e ſpecial Sentence or Judgment, as that of the *Spencers*.*

If the Father be in Exile, this hinders not the Freedom of the Son, for the ſame is not a thing deſcendible; for ſhould it be ſo, then the Baniſhment of the Father would make a Forfeiture of the Freedom; but the Son has this Freedom by his own Birth, as a purchaſe, and not by the death of his Father by deſcent: Like the Caſe where *J. S.* hath many Children, and then he confeſſeth himſelf a Villain to *J. D.* in a Court of *Record*; yet his Children formerly born are Freemen, and no Villains; the reaſon is, becauſe they were free by their own Births; but the Inheritance is inthralled, becauſe it is to come to the Heir by deſcent.

XI. A Freeman of a City or Borough may be made diversways, as my Lord *Coke* obſerves, 8 R. *fol.* 126. Caſe City of *London*.

1. By Service.
2. By Birth, by being the Son of a Free-man.
3. By Purchaſe or Redemption.
4. At *Briſtol* by *Marriage*.

Sir *John Davies* in his *Iriſh* Reports obſerves the ſame for Law. *Fol.* 12. St. *Paul* was born at *Tarſus* in *Cilicia*, which was under the Obedience of the *Romans*, by virtue of which he challenged the priviledge of a *Roman Citizen*; but it was accounted no more than a *National Freedom*; like that of *Calvin*, who claimed the general Freedom of an *Engliſhman*, being born in *Scotland*, but under the Obedience of the King of *England*; but that challenge made not St. *Paul* free of the private Cuſtoms, Privileges, and Franchiſes of *Rome*, no more than *Calvin*'s Birth made him a free Citizen of *London*, to the particular Cuſtoms of that City.

The

King Edward the 3d granted to John Falcount de Luca, an Apothecary of the City of London, *Quod ipſe omnibus libertatibus qu[as] Cives Civitatis prædict' habent in eadem Civitate alibi infra Regnum* Angl' *habeat, gaudeat & utatur, &c. Rot. Pat.* 32 *E.* 3. in the Tower; yet it was he[ld] That this Grant did not make him a Free-man of the City, for it cannot be [gain]ed but by one of thoſe ways. * Caſe of the City of *London, Co.* 8. *Report.*

The King, by his Letters Patents, cannot ma[ke] one a Free-man of *London*, * yet he may there[by] make him a Free-man of his Kingdom.

If one born in a City, of Parents that are [not] Free, the Child hereby is no Citizen by Birth; [and] if one be born of Free Parents out of the Place [of] Privileges, as *London*, &c. he yet is a Free-man [by] Birth; yet in the *Charter* granted to *Yarmouth*, the words were, *Conceſſimus Burgenſibus de Magna* Yarmou[th] *de villa prædict. oriundis*, that they ſhould have ſuch Liberties: So that ſpecial words may alter the Caſe.

London had many Royal Franchiſes granted them from time to time, and were often by former Kings ſucceſſively confirmed, nor wanted they a ſhare when the great Charter was granted, to have their ancient Liberties ſecured; nor were the ſucceeding Princes ſlack in their Royal Grants and Confirmations; but eſpecially *Richard* II. Who in Parliament granted and confirmed to them all their ancient Cuſtoms and Liberties, with this Clauſe, *Licet uſi non fuerint vel abuſi fuerint*; and notwithſtanding any Statute to the contrary, amongſt the Number of their many Priviledges, the Freedom of the ſame was accounted of no ſmall Importance, ſince in divers Parliaments it was very much aimed at, and endeavoured to be impaired; but at laſt they obtained a moſt gracious and Royal Confirmation in Parliament of their ancient Liberties, amongſt which it is declared, That no Merchant being a Stranger to the Liberty of the ſaid City, ſhould ſell any Commodities within the Liberty of the ſaid City, to other Merchant-Strangers; nor that any ſuch Merchant-Stranger ſhould buy of any other Merchant-Stranger ſuch Merchandize within the Liberty of the ſaid City, without Forfeiture thereof, ſaving that any Perſon, Lord, Knight, &c.

Confirmed by *Magna Charta cap.* 9. *Rot. Parl.* 7 *R. num.* 37.

9 *E.* 2. *cap.* 2. 29 *E.* 3. *cap* 2. 27 *E.* 3. *cap.* 11. 7 *H.* 4. *cap.* 1.

9 *H.* 4. this Act is not printed.

&c. may buy within the Liberties of any Merchant tranger Merchandizes in groſs for their own uſe, ſo hat they do not ſell them again to buy any other. nd as this City by Cuſtom may preclude any Perſon ot being free of the ſame, to ſell in ſuch manner upon ich pain; *(a)* So any other City, which are Boroughs or Cities by Preſcription within this Realm, ay have the like Cuſtom, and the Goods ſold or ought by ſuch, may be ſubjected to Forfeiture, but he ſame cannot be good by Charter or Grant. *Co.* 125. a.

(a) *Vide Salk.* 204. where 'tis held that ſuch Cuſtom is an Injury to the Party, and a Prejudice to the Publick.

A compleat Freeman is ſuch a one as hath challenged his Freedom, and taken the Free-man's Oath, nd is admitted into the Society and Fellowſhip of he Free-men, Citizens, and Burgeſſes, otherwiſe, e hath but a bare right to his Freedom.

James Baggs, Co. 11. Rep.

CHAP.

CHAP. II.

Of Aliens, as in relation to their Eſtates Rea[l] and Perſonal.

I. *Of an Alien his ability and diſability in the taking and enjoying of Eſtates Real and Perſonal.*

II. *Of his capacity in purchaſing, and diſability to transfer by an hereditary deſcent.*

III. *Of the Rules of deſcents, according to the Laws of ſeveral Countries.*

IV. *Of deſcents according to the rules of the Common Law of* England, *lineal and collateral.*

V. *Of Impediments in one that is not the* medius anteceſſor.

VI. *Of Impediments in one that is the* medius anteceſſor *lineal and collateral.*

VII. *Of the Statute of* Natis ultra Mare, *and Iſſues b[...] beyond Seas.*

VIII. *The* Lord Coke's *Opi[ni]on, that if an Alien has i[...] two Sons Denizens, the o[...] purchaſes Land, and dies, [...] other cannot inherit them, [...] bated and refuted.*

IX. *Of Foreign Births which [...] not create a diſability.*

X. *Of Aliens not diſabled [...] Law to bring either real [...] perſonal Actions.*

XI. *Of Office that muſt [...] the King to an Aliens Eſ[...]*

XII. *Of ſome particular Imm[u]nities, and other matters [re]lating to an Alien.*

7 *Co.* 16. a. I. AN *Alien* is one born in a ſtrange Country, un-der the obedience of a *ſtrange Prince* and Sta[te], and out of the Legiance of the *King of England*, and can have no real or perſonal Action for, or concern-

1 *Inſt.* 2. a, b. ing Lands; and therefore if he purchaſe Lands, Te-nements, or Hereditaments, to him and his Heirs, albeit he can have no Heir, yet he is of capacity *to take* a Fee-ſimple, but not *to hold*; for the King upon Of-fice found ſhall have it by his *Prerogative*.

So it is if he purchaſe Lands and dies, the Law doth caſt the Freehold and Inheritance upon the *King*.

1 *Inſt.* 2. b. But if he purchaſe or take a Leaſe for years of a

1 *Inſt.* 2. b. Houſe or a Ware-houſe, which is for the accommoda-ting him as a *Merchant-Stranger*, whoſe Prince or State is in League with ours, there he may hold the ſame, for that the ſame is incident to *Commerce*.

1 *Inſt.* 2. b. And in that caſe if he departs and relinquiſhes the Realm,

ealm, the King ſhall have the ſame, ſo it is, if he e no *Merchant.*

The like Law is, if he takes a Leaſe of Meadows, Lands, Woods or Paſtures, the King ſhall have the ſame; for the Law provides him nothing *but a Habitation to Trade and Traffick in as a Merchant.* *Paſch. 29 Eliz. Sir James Crofts* Caſe by the Judges.

II. Though he may take by purchaſe by his own Contract, that which he cannot retain againſt the King, yet the Law will not enable him by an Act of his own to transfer by hereditary deſcent (the Alien dying, his iſſue a *Denizen* born) the Land will not deſcend, or to take by *an Act in Law*; for the Law *Quæ nihil facit fruſtra*, will not give him an Inheritance or Freehold by an Act in Law, for he cannot keep it. 1 *Ven.* 417.

Therefore the Law will not give him
1. By Deſcent.
2. By Courteſie.
3. By Dower.
4. By Guardianſhip.

And in reſpect of that incapacity he reſembles a perſon *Attaint*, but with this difference.

The Law looks upon a Perſon *Attaint* as one that it takes notice of, and therefore the eldeſt Son attainted overliving the Father, though he ſhall not take by deſcent in reſpect of his diſability, yet he ſhall hinder the deſcent to the younger. *Vide Inſt.* 8. a

But if the eldeſt Son be an *Alien*, the Law takes *no notice of him*, and therefore as he ſhall not take by deſcent, ſo he ſhall not impede the deſcent to the younger Brother: As for inſtance, If there be three Brothers, the eldeſt an Alien, the other two naturalized, and the middle Brother purchaſe, and dies without iſſue, the younger Brother ſhall have the Lands. 32 *Ed.* 3. *Cozinage. Cro. Jac.* 539. *Dr. & St. Di.* 1. *c.* 7.

III. Concerning the Rule of Deſcents, we are not to govern our ſelves therein by the general notions of *Love* or *Proximity of Nature*, but by the *Municipal* Laws of the Country wherein the queſtion ariſeth; for the various Laws of divers Countries have variouſly diſpoſed the manner of deſcents, even in the ſame line and degree of Proximity: For inſtance, The Father certainly is as near of kin to the Son, as

the Son is to the Father, and [h]is nearer in Proximit[y] than a Brother, and therefore ſhall be preferred as next of kin in adminiſtration to the Son's Eſtate.

According to the *Jews*, for want of iſſue of the Son, the Father ſucceeds, excluding the Brothers, and that hath been the uſe and conſtruction of the *Jewiſh Doctors* upon *Numb.* 27. 9. but the Mother was wholly excluded.

Seld. de ſucceſſionibus apud Hebraos, cap. 20.

2. According to the proviſion of the *Greeks* for the ſucceſſion or excluſion of the Father, is left doubtful.

3. By the *Roman* or *Civil Law*, according to the eſtimation of the *twelve Tables*, the Father ſucceeded in the purchaſe of the Son for want of iſſue of the Son under the title *proximit agnato*, and ſo was the uſe, but my *Lord Coke* ſuppoſes the contrary.

Comment on *Littleton, fo.* 10. 8. *tit.* 1. *de haredibus ab inteſtato venientibus.*

But taking the whole Inſtitution of *Juſtinian*, the Son dying without iſſue, his Brothers, Siſters, Father, or Mother do ſucceed him as well to Land as Goods, in a kind of *Coparcenary*.

Goodwyn Antiq; de Teſtamentis, fo. 233. Cuſtoms *Normand. c.* aſſcheancres.

4. According to the Laws of *Normandy*, (which in ſome things have a cognition with our Law) his Brothers are preferred before the Father, (if the Son die iſſueleſs) but his Father before his Uncle.

5. According to the Laws of *England* the Sons dying ſans iſſue, or Brothers, or Siſters, the Father cannot ſucceed, but it deſcends to the Uncle.

Lit. § 3.

IV. There be two kinds of Deſcent, according to the *Common Laws* of this Realm.

1 *Inſt.* 10. a. b.

1. *Lineal*, from the Father or Grandfather to Son to Grand-ſon.
2 *Collateral* or *tranſverſed*, as from Brother to Siſter, Uncle to Nephew, and *è converſo:* And both theſe again of two ſorts.
1. *Immediate*, as in lineals from Father to Son.
2. *Mediate*, as in lineals from Grandfather to Granchild, where the Father dying in the life-time of the Grandfather, is the *medium differens* of the deſcent.

Grotius de Jure Belli ac Pacis lib. 2. *cap.* 7.

Collateral, as in lineal, from Uncle to Nephew, or *è converſo*.

And this mediate Deſcent, or mediate Anceſtor, though to many purpoſes it be immediate; for the Father

'ather dying in the life of the Grandfather, the Son ucceeds in point of deſcent in the Lands immediate-y to the Grandfather; and in a Writ of *Entry* ſhall e ſuppoſed to be in by the Grandfather, and not in he *poſt & cui*.

This is called a Mediate Deſcent, becauſe the Fa-her is the *medium* through whom the Son derives his itle to the Grandfather.

In immediate Deſcents there can be no impediment, out what ariſes in the Parties themſelves: For inſtance, the Father ſeized of Lands, the impediment that hin-ders the deſcent muſt be in the Father or Son, as if either of them be attaint or an Alien.

In mediate Deſcents, a diſability of being an Alien or Attaint, in him that is called the *medius anteceſſor*, will diſable a Perſon to take by deſcent, though he himſelf have no ſuch diſability.

In *Lineal* Deſcents, if the Father be Attaint or an Alien, and hath iſſue a *Denizen* born, and die in the life-time of the Grandfather, the Grandfather dies ſeiz-ed, the Son ſhall not take, but the Land ſhall *eſcheat*.

In *Collateral* Deſcents, *A.* and *B.* Brothers, *A* is an Alien or Attaint, has iſſue C. a Denizen born, *B.* pur-chaſes Lands and dies without iſſue, C. ſhall not inhe-rit, becauſe *A.* which was the *medius anteceſſor* or *me-dium differens*, is uncapable. *Dyer*, 271. *Grayes* Caſe.

V. But in any Deſcents, the impediment in an An-ceſtor that is not *medius anteceſſor*, from whom and to whom, will not impede the deſcent.

As for inſtance, The Grandfather and Grandmo-ther both Aliens, or attaint of Treaſon have iſſue, the Father a *Denizen*, who hath iſſue the Son a *natu-ral born Subject*, the Father purchaſes Lands, and dies, the Son ſhall be Heir to the Father, notwithſtanding the diſability of the Grandfather, (and yet all the Blood which the Father hath is derived from his diſabled Parents) for they are not *medii ante-ceſſores*, between the Father and the Son, but pa-ramount. *Courtney's* caſe Common Pleas Coron. *fol.* 141.

The Law does not hinder, *but that an Alien is of the ſame degree and relation of conſanguinity, as natural born Subjects or Denizens born*, the Son, the Father and Bro-

ther though Aliens; the Son, Father and Brother our Law takes notice of as well as natural born Subjects, and ſo it was adjudged, for he ſhall be preferred in *Adminiſtration*, though an Alien, *as next of kin*.

Mich. 1 Car. Cro. 1 Part. 8, 9. Caroon's Caſe.

But in caſes of *Inheritance* the Law takes *no notice of him*, and therefore as he ſhall not take by deſcent, ſo he ſhall not *impede* the deſcent to the younger Brother: As for inſtance, *A*, an Alien, *B* and *C* naturalized by Act of Parliament, (Brothers) *B*. purchaſes Lands, and dies *ſine prole*, C. ſhall inherit, and not *A*.

29 Ed. 3. tit. Cozenage 5.

A. an Alien, *B*. and C. his Brothers, both naturalized by Act of Parliament, *B*. purchaſes Lands, and dies without iſſue, the ſame ſhall not come to *A*. nor to his iſſue, though a Denizen, but ſhall come to C. and his iſſue; the Law taking no *notice* of *A*. as to *impede* the ſucceſſion of C. or his iſſue, though it work a *conſequential diſability* to bar the iſſue of *A*. parallel to what the Law calls *Corruption* of Blood, which is a conſequent of Attainder.

Ramſey's Caſe, 15 Car. 2. in Com. Banc.

VI. Again, in Lineal Deſcents, if there be a Grandfather a natural born Subject, the Father an Alien, Son natural born Subject, the Father is made a Denizen, he ſhall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grand-child, *though born after the Denization*, doth not remove neither the Perſonal nor Conſequential impediments or incapacity of the Father.

In *Collateral* Deſcents, the Father a natural born Subject has iſſue two Sons Aliens, who are both made Denizens, and dies without iſſue, the other ſhall not inherit him.

Godfrey and Dixon's Caſe. Hill. 16 Jac. in B. R. Godbolt, 275, 2. Cro 539. 2 Rolls Rep. 92. Vaughan 285. Levins 59.

A. an Alien marries an *Engliſh* Woman, who is ſeized of Lands and has iſſue, the Father and Mother dies, yet the iſſue may inherit the Mother, *non obſtante* the incapacity of the Father being an Alien.

VII. The Statute *de Natis ultra Mare*, declares the iſſue born of an *Engliſhman* upon an *Engliſh* Woman ſhall be a Denizen; yet the conſtruction has been, though an *Engliſh* Merchant marry a Foreigner, and has iſſue by her born beyond the Seas, *that iſſue is a natural born Subject*.

De Natis ultra Mare, 25 Ed. 3. Cro. Car. 601.

But if an *Engliſh* Woman go beyond the Sea, and there marry an Alien, and have iſſue beyond the Sea, that iſſue are Aliens. 16 *Car.* 1 *Cro.* 601. *Bacon's* Caſe.

If an *Engliſh* Woman marries an Alien beyond the Seas, and then comes into *England* and has iſſue, they are not Aliens, but may inherit. *Prowdes* Caſe of *Kent.*

VIII. My Lord *Coke* in his *Commentaries* on *Littleton*, ſeems to be of Opinion, That if an Alien has iſſue two Sons born in *England*, one dying without iſſue, the other ſhall not inherit him. But the Law is otherwiſe taken at this day, as I conceive the reaſons that have been given, are, Com. Lit. fol. 8. 1 *Lev.* 60. 1 *Sid.* 198. 1 *Ven.* 429. *Hard.* 224.

1. Though the deſcent from one Brother to another Brother be a *collateral deſcent*, yet it is an *immediate deſcent*, and conſequently if no diſability or impediment can be found *in them*, no impediment in *another Anceſtor* will hinder the deſcent between them. *Per.* L. C. J. *Hales* in *Ramſey's* Caſe.

That this is an Immediate Deſcent appears,

Firſt, In point of pleading, one Brother ſhall derive himſelf as Heir to another, without mentioning any *other Anceſtor*.

Secondly, According to the computation of *Degrees*, Brother and Brother make but one *degree*, and the Brother is diſtant from his Brother or Siſter in the *firſt degree* of *Conſanguinity* and no more, by the Laws of *England*.

According to the *Civil Law* * Brother and Brother make but *one degree*, for the Brother is in the *ſecond degree* from the Brother, yet both make but *one degree*. * *Juſt. l.* 9. *tit. de gradibus conſanguinitatis* 38.

According to the *Canon Law* † *Frater & Frater*, or *Frater & Soror ſunt in primo gradu*. † *Decret. Gratiani, cap.* 35. *quaeſt.* 5.

And therefore the Laws prohibiting Marriage between Kindred in the *fourth degree*, take Brother and Siſter to be the *firſt degree* of the four.

The Laws of *England* in computation of the degrees of Conſanguinity agree with the *Canon Law*, and reckons the Brother and Brother to be the *firſt degree*. *Lit. Sect.* 20. 31 *Ed.* 3. *Gard.* 116. *Holland's* Caſe cited by *Littleton.*

Herewith agree the Cuſtoms of *Normandy* * which, though in ſome caſes differ from the Laws of *England*,

yet herein, and in divers other particulars touching deſcents, they agree.

* *Servien* in Comptes, degrees in line Collat. *Solenk*, *&c.*

Another Evidence to prove that the deſcent between Brothers is immediate, is this, *(viz.)* the deſcent between Brothers differs from all other collateral deſcents whatſoever, for in other deſcents collateral *the half blood does inherit*, but in a deſcent between Brother *the half blood does impede the deſcent*, which argues that the deſcent is immediate.

Brown's Caſe, *Mich.* 1656. *B. R. contra* 5 E. 6. Bro. Adminiſtration 47. which prefers the Brother of the half blood before the Mother.

The Uncle of the part of the Father has no more of the blood of the Mother than the Brother by the ſecond venter, the Brother by the ſecond venter has the immediate blood of the Father with the Uncle (*viz.* the Father's Brother) has not but only as they meet in the Grandfather; the Brother of the half Blood is nearer of Blood than the Uncle, and therefore ſhall be preferred in *Adminiſtration.*

It is apparent, that if in the line between Brother and Brother, the Law takes notice how the Father was the *medium* thereof, the Brother of the ſecond venter ſhould rather ſucceed to the other Brother, becauſe he is Heir to the Father; therefore in a deſcent between Brothers the Law reſpects only *the immediate relation of the Brothers as Brothers*, and not in reſpect of the Father, though it is true, the foundation of their Conſanguinity, is in their Father or Mother,

Again, if the Father, in caſe of a deſcent between Brothers, were ſuch an Anceſtor as the Law lookt upon as the *medium* that derives the deſcent from the one Brother to the other, then the Attainder of the Father would hinder the deſcent between the Brothers: But the Attainder of the Father does not hinder the deſcent between the Brothers; the reaſon is, becauſe *the Father is not ſuch a medium* or *nexus* that is looked upon by the Law, as the means deriving ſuch a deſcent between the two Brothers; As for inſtance of three caſes, two whereof evince the firſt propoſition, *(viz.)*

1 *Inſt.* 8. a.

That although the deſcent from one Brother to another Brother, though it be a collateral deſcent, yet is an immediate deſcent, *and that if no diſability or*

impediment

impediment ariſes in them, no impediment in another Anceſtor will hinder them.

The younger Brother has iſſue, and is attainted of Treaſon and dyes, the elder Brother has Title to a *Petition of Right*, dies *ſans* iſſue without a reſtitution, the younger Brothers Son has loſt that Title; for though the Title were in the Anceſtor that was not attaint, yet his Father that is the *medium* whereby he muſt convey that title was attaint, and ſo the deſcent was obſtructed. 10 *Eliz.* *Dyer*, 247. *Grayes* Caſe.

Henry Courtney had iſſue *Edward*, and was attainted of Treaſon and dyed, *Edward* purchaſed Lands and died without iſſue, the Siſters and Heirs of *Henry* were diſabled to inherit *Edward*; yet neither *Edward* nor his Aunts were attainted, or their blood corrupted; yet becauſe *Henry* was the *medium through whom* the Aunts muſt derive their Pedigree and Conſanguinity to *Edward*, who was attainted, the deſcent was obſtructed till a reſtitution in blood. *Com. placit. Coron. fol.* 241. *Henry Courtney's* Caſe.

But if the Grandfather of *Edward* had been attainted, and not *Henry*, this would not have hindred the deſcent from *Edward* to the Aunts, becauſe that *Attainder had been paramount* that Conſanguinity which was between *Henry* and his Siſter, and that is proved by this third caſe.

William Hobby had iſſue *Philip* and *Mary*, and was attainted of Treaſon and dyed, *Philip* purchaſes Lands, and dyed without iſſue; it was adjudged in that caſe, that *non obſtante* the Attainder of *William Hobby*, *Mary* ſhould inherit, becauſe the deſcent and pedigree between *Philip* and *Mary* was immediate, and the *Law regards not the diſability of the Father*. *Mich.* 40, 41 *Eliz.* ruled in the Exchequer in the Caſe of *Hobby*.

If the Heir of the part of the Father be attaint, the Land ſhall eſcheat, and ſhall never deſcend to the Heir of the part of the Mother; but if the Son purchaſe Lands, and has no kindred of the part of the Father but an Alien, it ſhall deſcend to the Heirs of the part of the Mother. 49 *E.* 3. 12. *per Tank* and *Perſhaw*.

9. Thoſe that are born *ſub fide, legiantia, obedientia Domini* Regis are not Aliens; and therefore thoſe that were born in Gaſcoyn, Normandy, Aquitain, Tournay, Callice, Guyan, whilſt they were under the Dominion *Co.* 7. *Rep.* 21. *Calvin's* Caſe.

minion of the Kings of *England*, were natural born Subjects, and not Aliens.

Scotland is a Kingdom by Union, and therefore thoſe that were born in *Scotland* under the Allegiance of the King, as of his Kingdom of *Scotland*, before the Crown came united, were Aliens born, and ſuch plea againſt ſuch Perſons was a good plea; but thoſe that were born ſince the Crown of England deſcended to King James, are not Aliens, for they were born *ſub fide & legiantia Domini Regis*; ſo thoſe that are born at this day in Virginia, New England, Barbadoes, Jamaica, or any other of his Majeſties Plantations and Dominions, are natural born Subjects, and not Aliens; ſo likewiſe thoſe that are born upon the King of *England*'s Seas are not Aliens.

Lord *Vaughan*, *fol.* 268. *Craw.* *verſus Ramſey.*

Sir *John Burrough*'s Sovereignty of the Seas, *fol.* 102.

X. But if an Alien be made an Abbot, Prior, Biſhop or Dean, by the plea of an Alien, we ſhall not diſable him to bring any real or mixt action concerning the poſſeſſions that he holds in his politick capacity, *becauſe the ſame is brought in auter droit*

The like Law is for an Executor or Adminiſtrator, becauſe the recovery is to another's uſe, 3 *Cro.* 683. *Brooks* againſt *Philips*; yet ſee the ſame *Book*, 142. *pl.* 7.

Paſch. 31 *Eli.* *C. B.* *Dy.* 2. *pl* 8. *Lutw.* 35. *Salk.* 46.

If an Action is brought againſt an Alien, and there is a Verdict and Judgment againſt him, yet he may bring a Writ of Error and be Plantiff there, and that ſuch plea is not good in that caſe.

Mich. 6. *Jac.* in *C. B.* Brownlow. 1. part, *fol.* 42.

Though an Alien may purchaſe and take that which he cannot keep or retain, yet the Law hath provided a mean of inquiry before he can be diveſted of the ſame, for until ſome *Office* be found, the Free-hold is in him.

And this Office, which is to gain to the King a Fee or Free-hold, muſt be under the *Great-Seal* of *England*, for a Commiſſion under the *Excheqaer-Seal* is not ſufficient to entitle the King, to the Lands of an Alien born, for the Commiſſion is that which gives a title to the King, for before that the King hath no title; but in caſes of *Treaſon*, there upon Attainder the Lands are in the King without Office, and in that caſe, to inform the Court a Commiſſion

Mich. 29 *Eliz.* in *C. B.* *Goldſborough*, *Fo.* 29. *Mich.* 30 *Eliz.* *Coke* 5. *part*, *Pages* Caſe, *fol.* 52. *Moore* 4 *Walton ver.* *Maſhum.* *Dyer* 282. *Alien* Stamfords Prerogative *Regis*, *art.* 18. *fol.* 53. *tit*, King Seiſin, &c.

on may go out under the Exchequer-Seal. Croſs verſ.

XI. If an Alien and a Subject born purchaſe Lands o them and to their Heirs, they are *joint Tenants*, nd ſhall joyn in Aſſize, and the Survivor ſhall hold lace till Office found. Gayer, Cro. 3. part, fol. 123. Plowd. Com. 477. 17 E. 3. fol. 10 Hen. Hill. Caſe.

By the finding of this Office the Party is out of oſſeſſion, if the ſame be of Houſes or Lands, or uch things as do lye in livery; but of Rents, Common, Advowſons, and other Inheritances incorporeal which lye in Grant, the Alien is not out of poſſeſſion (be they appendant or in groſs) therefore if an Information or an Action be brought for the ſame, the Party may traverſe the *Office* in that Court, where the Action or Information is brought for the King.

And if the King obtains not the poſſeſſion within the year after the Office found, he cannot ſeize * without a *Scire facias*. * 29 Aſſize 30, 31, 32. Aſſize Travers 32. vouched in Stamford plt. fol. 54. cap. 18.

It is not for the *Honour of the King* (an Alien purchaſing of a Copy-hold) to ſeize the ſame, for that the ſame is a baſe Tenure; and ſo it was adjudged † where a Copy-hold was ſurrendred to *J. S.* in truſt, that one *Holland* an Alien, ſhould take the profits thereof to his own uſe and benefit; upon an Inquiſition taken, it was adjudged the ſame was void and ſhould be quaſhed, becauſe the King cannot be entituled to the Copy-hold Lands of an Alien, nor to the uſe of Copy-hold Lands as the principal Caſe was. † 23 Car. in B.R. Styles 20. King verſ. Holland.

An Alien Infant under the Age of 21 Years, cannot be a Merchant Trader within this Realm, nor can he enter any Goods in his own name at the Cuſtom-houſe. 13 & 14 Car. 2. cap. 11. §. 10

If an *Engliſh* Man ſhall go beyond the Seas, and ſhall there become a ſworn Subject to any *Foreign Prince* or *State*, he ſhall be looked upon in the nature of an Alien, and ſhall pay ſuch Impoſition, as Aliens, if he comes and lives in *England* again, he ſhall be reſtored to his Liberties. 14, 15 H. 8. cap. 4.

An Alien is robbed, and then he makes his Executor, and dyes, and afterward the Goods are waſt, the 1 Ro. 114. 3 Bulſtr. 19.

the Lord of the Franchiſe ſhall not have them, but the Executors. *Vide* 13 *E.* 4. *fol.*

All Perſonal Actions he may ſue as on a Bond, ſo likewiſe for words; for the *Common Law* according to the Laws of Nations protects Trade and Traffick, and not to have the benefit of the Law in ſuch caſes is to deny Trade.

1 *Bulſt.* 134. *Telverton* 198. *Turloote verſus Monſon* 8. *Jac. B. R.* *Moore*, *fol.* 431.

But yet Aliens and Denizens are reſtrained by the Statute of 5 *Eliz. Ca.* to uſe any Trade, not having ſerved ſeven years as Apprentices within the Realm. *Vide* the Statute what Trades, *Trin.* 12 *Car.* 1. at Sergeants-Inn in *Fleet-ſtreet* by all the Judges. *Hutton*'s Reports, *fol.* 132. but *quære* that Reſolution.

CHAP.

CHAP. III.

Of Naturalization and Denization.

Whether the Kings of England *can naturalize without Act of Parliament.*
I. *What operation Naturalization hath in reference to remove the diſability ariſing from themſelves.*
III. *What operation Naturalization hath in reference to remove defects ariſing from a lineal or collateral Anceſtor.*
IV. *Where Perſons born out of the Realm may inherit by the Laws of* England.
V. *A Kingdom conquered, and united to the Crown of* England, *whether by granting them a Power to make Laws can implicitely create in them ſuch a Soveraignty, as to impoſe on the Realm of* England.
VI. *Of Perſons naturalized by a Kingdom dependent, whether capable of impoſing on one that is abſolute.*
VII. *Of Kingdoms obtained by conqueſt, how the Empire of the ſame is acquired, and how the Conqueror ſucceeds.*
VIII. Ireland *what condition it was accounted before the Conqueſt in reference to the Natives of the ſame, and whether by making it a Kingdom, they can create a Foreigner as a natural born Subject of* England.
IX. *Of Aliens in reference to the tranſmiſſion of their Goods and Chattels by the Laws of* France.
X. *Of the Priviledges the Kings of* England, *of old, claimed in the Eſtates of Jews dying commorant here, and how the ſame at this day ſtands.*
XI. *Of Perſons born in places annexed or claimed by the Crown of* England, *how eſteemed by the Laws of the ſame.*
XII. *Of Denization, and what operation it hath according to the Laws of* England.
XIII. *Where an Alien is capable of Dower by the Laws of* England, *and where not, and of the total incapacity of a Jew.*
XIV. *Whether a Denizen is capable of the creation and retention of Honour, by the Laws of* England.

I. THE Father and Mother are the fountain of the blood natural, and as it is that that makes their Iſſue, Sons or Daughters, ſo it is that that makes them Brothers and Siſters; but it is the civil qualifications of the blood that makes them inheritable one to the other, and capable of enjoying the Immunities and Privileges of the Kingdom; but that

that is from another fountain, *viz.* the Law of the Land, which finding them legitimate, doth tranſplant them into the Civil Rights of the Land, by an Act called Naturalization; which does ſuperinduce and cloath that natural Conſanguinity with a Civil hereditary quality, whereby they are enabled not only to inherit each other, but alſo to enjoy all the Immunities and Privileges that meer natural born Subjects may or can challenge.

Serv. lib. 2. cap. 12. II. According to the Laws of *Normandy* the Prince might *naturalize*; but ſuch *Naturalization* could not diveſt the deſcent already veſted.

1 Inſt. 129. 1. But according to *our Law* by noway but by *Act of Parliament*, and that cures the defect as if they had been born in *England*, and no Man ſhall be received againſt an *Act of Parliament* to ſay the contrary.

Therefore if the Father an *Alien* has iſſue a *Son* born *here*, and then the Son is naturalized, the Son ſhall inherit.

Com. Litt. 129. If the Father, a *natural born* Subject, has iſſue an *Alien* who is *naturalized*, the Father dyes, the Son ſhall inherit.

III. *Naturalization* does remove all that *diſability* and *incapacity*, which is in Aliens in reſpect of themſelves, and ſo puts them entirely in the condition as if they had been *born in England*.

The *Relative* terms, as if *born* in *England*, is generally uſed to ſupply the *perſonal defect* of the parties naturalized, ariſing from their *birth out of England*, and therefore ſhall never be carried to a *collateral* purpoſe, nor cures a diſeaſe of *another* nature, as *half blood*, *illegitimation*, and the like; but all diſeaſes, whether in the *parties* themſelves, or reſulting from the Anceſtor, it cures.

Acts of Parliament of this nature may be ſo penn'd, as to cure defects in the *Father* or *Anceſtor*, or in the parties *themſelves*.

If *Reſtitution* in blood be granted to the *Son* by Act of Parliament, this cures that *diſability* that reſulted from the *Fathers* Attainder, and that not only to the *Son*, but alſo to the *collateral Heirs* of the Father; the *Coke 3. Inſt. fol. 241.* true reaſon of this is, becauſe *the corruption of the blood*

by

by the *Attainder is only blood of the Father, for the Sons blood or collateral Heir was not at all corrupted*; for the ſcope of the Act *taking* notice of the Father's Attainder, does *intentionally* provide againſt, and remove it, For otherwiſe the ſame had been uſeleſs.

But in *Naturalization* without expreſs words, it takes no notice of the defects in the Father or other Anceſtor, nor removes them.

And therefore ſuch *Acts of Parliament* as take no other notice but of the *Perſons Naturaliz'd Foreign birth*, the ſame cures not any diſability of *tranſmiſſion hereditary* between the Father, Brother, or any other Anceſtor, *reſulting* from the diſability of them without *actually naming of them*: As for inſtance, the Father an Alien, the Son naturalized by Act of Parliament, the Father or any other Anceſtor an Alien purchaſes Lands and dyes, the Son ſhall not take by reaſon of the diſability in the Father, but there *may be words* inſerted in the Act that may take away the impediment.

IV. There are four ways by which Men born out of *England*, may inherit in *England*, beſides by the Statute of *Edward* the Third, *De Natis ultra mare*.

1. If they be born in any Dominion of the King's, when he is actually King of *England*.

2. If they be made inheritable by Act of Parliament in *England*.

3. If they be born Subjects to a Prince holding his Kingdom or Territories as Homager and Leigeman to the King of *England* during the time of his being Homager: So the *Welch* were inheritable in *England* before 12 *Ed.* 1. though Subjects to the Princes of *Wales*, who were Homagers to the King of *England*. So were the *Scotch* in *Edward* the Firſt's time; but when once the Homage determines, then they become Aliens, otherwiſe Subjects, and upon that reaſon *Magdulph* a *Scot* appealed * from the Judgment of his Prince to *Edward* the Firſt *ut Superiori Domino Scotiæ*; but then it muſt be underſtood where ſuch Prince is Homager *ſubjectionis*, and not only *infeodationis*, for another King may hold of the King of *England* an Iſland

Calvin's *Caſe*, *fol.* 21. b.

* *Placit. Parl.* 21. *Ed.* 1. *fol.* 152, 157.

Iſland or other Territory by tenure, and not be a Subject.

4. If the King of *England* enters in a hoſtile manner the Territories of another Prince or State, and any be born within any of the Places or Guards poſſeſſed by the King's Army, they are looked upon in Law to be within his protection, and ſuch Perſon born is a natural born Subject of *England*, but then he muſt be of Parents Subjects †, not hoſtile; and therefore a Baſtard born in *Tangier* is capable of purchaſing Land in *England*, if his Parents were Subjects.

† 5 *Eliz.* *Dyer.* *fol* 224. *placit.* 29. *Craw verſ.* *Ramſey*, Lord *Vaughan*, *fol.* 280.

V. Thoſe that are born in *Ireland*, and thoſe that are born in *Scotland* are all alike, for their Births are within the Kings Dominions, and they are born under the like ſubjection and obedience to the King, and have the like band of allegiance *ad fidem Regis*, yet if a *Spaniard* comes into *Ireland*, and by the *Parliament* is there naturalized, though perhaps this may qualifie and cloath him with the title of a *natural born* Subject of *Ireland*, yet it has been conceived, that it will not make him a natural born Subject of *England*.

For the Union of *Ireland* to that of *England*, is different from that of *Scotland*; for the firſt is dependent as a Kingdom conquered, the latter independent: Though *Henry* the Second after his Conqueſt of that Nation, did remit over from *England* the ancient *modus tenendi Parliamentum*, enabling them to hold Parliaments, which after was confirmed by King *John*; yet that was by no other force than bare Letters Patents. Now when a Nation is once conquered, there remains no Law, but that of the Conqueror; and though he may incorporate ſuch conquered Nations with his own, and grant unto them their ancient Parliamentary ways of making of Laws; yet the Conqueror can no ways grant unto them a Power, by virtue of ſuch Grant or Confirmation, as to impoſe upon his own Country, for he himſelf before ſuch Conqueſt, could not make a natural born Subject without Act of Parliament, and moſt certainly his Conqueſt adds nothing to his Power, though it does increaſe his Dominion.

My Lord *Coke* ſo conceives; but Mr. *Selden* denies that ever there was any ſuch *modus tenendi*, but the ſame is an impoſture. *Vide* his Tit. of Honour, *fol.* 708, 710, 718, to 721.

VI. Again,

VI. Again, Kingdoms that are abſolute under one Prince, *ad fidem Regis*, there the Acts of each other are reciprocate, and one naturalized by the Parliament of *Scotland*, is as naturalized in *England*, becauſe *Scotland* is a Kingdom abſolute, and yet in the Caſe of *Craw* and *Ramſey* it is there held, That an Alien naturalized in *Scotland* remains an Alien notwithſtanding; but *Ireland* is a Kingdom dependent and ſubordinate to the Parliament of *England*, for the Parliament in *England*, can make an Act to bind *Ireland*, but not *è converſo*. Now to be a Native of *Ireland*, is the ſame as to be born in *Ireland*, but that is by the Laws of *Ireland*; but to be born in *Ireland*, and to be the ſame as to be born in *England*, muſt be by the Laws of *England*: But there is no Law that hath enabled them with ſuch a power, as to naturalize further than their own Laws extend; but the Law of *Ireland* does not extend into *England*, therefore Naturalization in *Ireland* operates only in *Ireland*, becauſe of the failure of power.

Selden's Titles of Honour. *fol.* 213. In *Scotland*, the title is *Carolus Scotiæ, Angliæ, Franciæ, & Hiberniæ Rex*; but in *Ireland*, *Angliæ, Scotiæ* Note *Scotland* is not a Dominion belonging to the Crown of *England*, but to the King of *England*.

VII. Again, Kingdoms that are conquered, the Empire of the ſame may be acquired by the Conqueror, only as it is in a King, or other Governour, and then the Conqueror, only ſucceeds in his right, and no further *, or alſo as 'tis in the People, in which caſe the Conqueror hath Empire, ſo as that he may diſpoſe of it, or alienate it as the People themſelves might; *for 'tis one thing to inquire of the thing, another, of the manner of the holding of it*, the which are applicable not only to corporal things, but incorporal alſo: For as a Field is a thing poſſeſſed, ſo is a Paſſage, an Act, a Way; but theſe things ſome hold by a full right of property, others by a right of uſufructuary, others by a temporary right. Again, by the Will of the Conqueror, the Kingdom or Republick that is ſo conquered, may ceaſe to be a Kingdom or Commonwealth, either ſo that it may be an acceſſion of another Kingdom or Commonwealth, as the *Roman* Provinces, or that it may no ways add hereto any Kingdom or Commonwealth, as if a King waging War at his own charge, ſo conquer and ſubject a People to himſelf, that he will have

From hence it is that the King at this day cannot alien or ſell *Ireland* without an Act of Parliament, for they whoſe right he ſucceeds, could not do it, *Co.* 4. *Inſtit. fol.* 357. nor can he grant, *Portus Mariæ obedienciis ad vocationibus & patronationibus Eccleſiarum Metropoliticarum & Cathe-*

have them governed, not for the profit of the People chiefly, but of the Governour, which is a property of that we call *Herile Empire* †, not of Civil: for Government is either for the profit of the Governour, or for the utility of the Governed; this hath place among Free-men, that among Maſters and Servants. The People then that are kept under ſuch command, will be always for the future not a Commonwealth, but a great Family: Hence it is that we may plainly underſtand, what kind of Empire that is, which is mixt of Civil and Herile, that is, where Servitude is mixt and mingled with ſome perſonal liberty: For if the People are deprived of Arms, commanded to have no Iron but for Agriculture, to change their Language and courſe of Life, and abſtain from the uſe of many of their Cuſtoms, to be confined * to their own Houſes, Caſtles, or Plantations, nor wander abroad to be governed by ſuch Laws as the Conqueror ſhould tranſmit to them †, all which are the tokens of a Nation by Conqueſt made ſubordinate to the Conqueror, and are part Herile, and part Civil; and though they may remain a Kingdom, and abſolute within themſelves as to the making of Laws, to obliging each other, yet they can no ways impoſe on their Conqueror, for though that be true which in *Quintilian* is alledged on the behalf of the *Thebans*, That that only is the Conqueror's which he holds himſelf; but an incorporeal right cannot be holden, and the condition of an Heir and of a Conqueror is different, becauſe the *Right* paſſeth to the former by the *deſcent*, but only the *thing* to the laſt by virtue of the Conqueſt. But certainly that is no objection, for he that is Maſter of the Perſons, is alſo Maſter of the Things and of all right which does belong to the Perſons: for he that is poſſeſſed †, doth not poſſeſs for himſelf, nor hath he any thing in his power who hath not himſelf; and ſo it is if he leaves the right of a Kingdom to a conquered People, he may take to himſelf ſome things which were the Kingdom's, for

dralium Cancellar. Juſticiar. nor *mero & mixto Imperio*, and many more, all which are inſeparably annexed to a Kingdom.

† *Imperium aliud eſt ob utilitatem ejus qui regitur, hoc inter liberos locum habet, illud inter dominos & ſervos, Ariſt lib.* 7. *de Republica.*

* Caſe of the Earl of *Shrewsbury* on the Stat. of 28 *H.* 8. of Abſentees, 4 *Inſt.* preſcribes, *fol.* 354.

† Or elſe they came to *London* for them, *Cl.* 18 *H.* 3. *m.* 17. *Ariouiſtus apud Cæſarem, jus eſſe belli ait, ut qui viciſſent, iis quos viciſſent quemadmodum vellent imperarent; de bello Gallico, l.* 1.

† *Leg. qui in ſervitute eſt, reg. Juris Leg. ſi venerit D. ed. Leg. Jud. de Adult.*

: it is at his pleaſure to appoint what meaſure he will his own Favour: From hence it is we may ob- ·rve what ſort of Empire that Kingdom is at this ɪy.

VII. Now *Ireland* before the ſame became united the Crown by the Conqueſt of *Henry* the Second, e· Natives were meer Aliens and out of the pro- ction of the Laws of this Realm; yet when once ey became a conquered People, and ſubject to the ·own of *England*, and united *ad fidem Regis*, then d ariſe their Allegiance; but that *Union* neither ade them capable of the Laws of *England*, nor their own, till ſuch time as the Conqueror had ſo clared them: Now what do they deſire in order to vive their Government? Firſt, they humbly beg King *Henry* the Second, that ſince he was pleaſed ıat they ſhould remain as a diſtinct Dominion, *that eir ancient Cuſtoms or Uſages ſhould not continue; that e would be pleaſed or ordain, that ſuch Laws as he had in* England * *ſhould be of Force, and obſerved in* Ireland; ourſuant to which he grants them power to hold Aſſem- blies by the *three Eſtates of the Realm*, and that they hould be regulated according to the Inſtitution and nanner of the Parliaments in *England*, ſhould have

Calvin's Caſe. *Lib.* 7. *fol.* 23.

For at a general Council at *Caſſels* of all the Clergy there, *Anno* 1170. Eccleſiaſtical Laws of *England* vere eſtabliſhed, and made of force in *Ireland. Geraldus Cambrenſis Topographia Hibernia, lib.* 3. *cap.* 18. * *Pat.* 8 *E.* 1. *m.* 13. *Hibern.*

the benefit of *Magna Charta*, and other the great Laws of *England* *, and by ſuch means put them into a method of governing themſelves according to known ways of *England*, and to make ſuch Laws as ſhould bind among themſelves; and by following the example of thoſe of *England* †, their Judgment might be ſupervised, and corrected according to the Juſtice and Laws of *England*, by Writs of Error, Appeal and the like*.

* *Matthew Paris Hiſt. Angl. pag.* 121. *Leges Angliæ ab omnibus ſunt gratè accepta.*

† *Orurck's* Caſe, 33 *Eliz. Cok.* 7. *part, fol.* 23.

Calvin's Caſe. * *Ryly's Placita Parliam. pag.* 198 to 208.

Now here is no continuing or reviving their ancient Government, but the introducing a new one, part Civil, and part Herile; nor indeed had they before any ſuch thing as a Parliament there, or ge-

Oo neral

Sir *John Davies* on the Conqueſt of *Ireland*, 103, 104, 105.

neral Aſſembly of the three Eſtates; for when *Harry*, the Second went over, there were ſeveral Kings or Scepts, who had their ſeveral and diſtinct Aſſemblies; but when they ſubmitted, this great Aſſembly of Eſtates which he conſtituted, was a collection out of all of them, for their future well Government; ſo that whatſoever *modus* of Regimen the Conqueror declared, it was no more than for the well governing of the place, and making ſuch Laws as were neceſſary, and proper amongſt themſelves. But for them to impoſe, by virtue of an Act of Naturalization, upon an abſolute Kingdom as *England* without the conſent of the three Eſtates of the ſame, ſurely was never intended, much leſs effected: The caſe is both great, dubious, and curious, therefore *quære*.

Lord *Vaughan, fol.* 301. *Craw verſus Ramſey.*

IX. By the Laws of *France* all Perſons not born under the legiance of that King, are accounted Aliens, and if they die, the King is entitled to their Eſtates; for all ſhall be ſeized into his *Exchequer*, or *Finances*; but if they make a Will, the Prerogative is diſappointed: Yet that extends only to Chattels perſonal, in which Strangers paſſing through the ſame, have greater Immunities than Aliens there reſident; for Travellers dying without Will, the Heirs or Executors ſhall have benefit and poſſeſſion of their Eſtates.

X. The like Priviledge the Kings of *England* formerly claimed in the Goods and Eſtates of the *Jews* after their death, if the Heir ſued not, and paid a Fine to the King to enjoy them, as by this Record appears.

Juratores ſuper ſacrum ſuum' dicunt quod prædictum Meſſuagium fuit quondam Eliæ le Bland, *qui, &c.* diem clauſit extremum, *et quia mos eſt Judaiſmi quod Dominus* Rex *omnia, &c. Cattalla Judei mortui de jure dare poterit cui voluerit, niſi propinquior hæres ejuſdem Judæi finem fecerit pro eiſdem, dicunt quod Dominus Rex dictum Miſſuagium dare poterit cui voluerit ſine injuria alicui facienda, ſi ita quod ſit hæres dicti* Elæi, *finem non ſecrcit pro Catallis ejuſdem* Eliæ *habendis, &c.*

Eſcheat An. 52. *H.* 3 *num.* 31.

Caroon's Caſe. But whether the ſame is now uſed, may ſeem doubtful;

loubtful; for the Goods of Aliens eſcheat not at this lay to the Crown, but Adminiſtration ſhall be com- nitted to the next of kin. [*Hobby's Caſe. Stephen's Caſe*]

XI. By the Laws of France, *Flanders*, *Milan*, *Savoy*, nd the *Frenche Compte*, though poſſeſſed by ſeveral ther Princes, yet the Natives of the ſame partake in he Immunities with the natural born Subjects of *France*, nd if they die without Will, their Heirs claim their Eſtates; the Reaſon given, becauſe, ſay they, thoſe ountries were never alienated from them, but were al- vays annexed to the Crown of *France*, who acknowledg- s them to be his Subjects to this day.

But in *England* it is otherwiſe, for thoſe that are orn in *Gaſcoin*, *Normandy*, *Aquitain*, and thoſe other Teritories which were formerly the poſſeſſions of he Crown of *England*, in which if any had been orn when ſubject to the ſame, they would have been natural born Subjects, yet now are eſteemed Aliens; and ſo was the caſe vouched by *Shard*, of a *Norman*, who had robbed together with other *Engliſh* divers of his Majeſties Subjects in the narrow Seas, be- ing taken and arraigned, the *Norman* was found guilty only of Felony, and the reſt of Treaſon; for that *Normandy* being loſt by King *John*, was out of the Al- legiance of *Ed.* 3. and the *Norman* was accounted as an Alien. [*Note*, This was before the Statute of 25 *E.* 3. it's vouched by *Shard* in 40. Aſſize *pl.* 24*l.* See *Calvin's* Caſe 7. Report.]

XII. In *France* the Kings may there Denize, ſo like- wiſe here in *England*, but with this difference, the Let- ters of Denization by thoſe of *France* remove the total diſability and incapacity of the Alien.

But in *England* the Charter of Donation or Deni- zation is but a temporary, partial, and imperfect *a- motion* of the diſability of an Alien; for though it puts the Perſon indenized, as to ſome purpoſes, in the condition of a Subject, and enables a *tranſmiſſion* hereditary to his Children, born after the Deniza- tion, yet it does not *wholly* remove the *diſeaſe* or *non- ablity*, as to the points of *deſcent* or *hereditary tranſ- miſſion*, and reſembles a Perſon in caſe of an *Attain- der*; and therefore if he purchaſes Lands and dies without iſſue, the Lord by Eſcheat ſhall have the Lands. [*Vide* 1 *Inſt.* 129. 2. The Difference between Naturalization and Denization. *Co.* 1 *Inſt.* *fol.* 2.]

And therefore in lineal Deſcents, if there be Grandfather natural born Subject, Father an Alien, Son natural born Subject, the Father is made Denizen, ſhall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grand-child (though born after the Denization) ſhall not inherit the Grandfather, for the Denization does not remove neither the perſonal nor the conſequential impediment, or incapacity of the Father.

Godfry and *Dixon*'s Caſe. *Hill.* 16 *Jac.* B. R. *Godbolt.* 175. 30 *H.* 8. *Dyer* 44. 1 *Inſt.* 31. b.

So likewiſe in collateral Deſcents; as for inſtance the Father a natural born Subject, had iſſue two Sons Aliens, who are both made Denizens, and one dies, the other ſhall not inherit him.

XIII. The like Law in Dower, a Man ſeized of Lands in Fee, and takes an Alien to Wife, and then dies, the Wife ſhall not be endowed: But if the King takes an Alien to Wife, and dies, his Widow Queen ſhall be endowed by the Law of the Crown. *Edmund*, Brother of King *Edward* the Firſt, married the Queen of *Navar*, and died, and it was reſolved by all the Judges, That ſhe ſhould be endowed of the third part of all the Lands whereof her Husband was ſeized in Fee.

26 *Ed.* 1. *Rot.* *part* 1.

1 *Inſt.* 31. b. 32. a.

A *Jew* born in *England*, takes to Wife a *Jew* born alſo in *England*, the Husband is converted to the Chriſtian Faith, purchaſes Lands, and enfeoffeth another, and dieth; the Wife brought a Writ of Dower, and was barred of her Dower, *Quia vero contra juſtitiam eſt quod ipſa dotem petat, vel habeat de tenemento quod fuit viri ſui ex quo in converſione ſua noluit ei adhærere, & cum eo convertere.*

Clauſ. 1 *H.* 3 *Mem.* 17. *Dorſ.*

C. 1 *Inſt. fol.* 278. *B.*

XIV. If an Alien be a Diſſeiſor, and obtains Letters of Denization, and then the Diſſeiſor releaſe unto him, the King ſhall not have the Land; for the Releaſe hath altered the Eſtate, and it is as it were a new purchaſe, otherwiſe it is, if the Alien had been Feoffee of the Diſſeiſee.

And though Aliens are enabled by Charter of Denization to a tranſmiſſion hereditary to their poſterity of Lands, yet a Denizen is not capable of *Honour*, nor a tranſmiſſion of the ſame, without *Naturalization by Parliament*; for by the Charter of Deni-

zation

ation he is made, *quaſi, ſeu tanquam ligeus*, but to be Member of Parliament, he muſt be *ligeus revera*, & *on quaſi*, for by his becoming a Nobleman, he claims e place of Judicature in Parliament, the which he annot till naturalized by Act of Parliament, and en he may claim as eligible to the ſame, or any ther: And the ſame Law is at this day in *France*, here no Foreigner can hold any Honour or Dignity in the State or any part of the Government. Tis true, Cardinal *Mazarine*, who was an *Itaalian*, held great ſhare in the ſame, but it was *vi*, & *manu for-*, and was the occaſion of introducing a Civil War in that Kingdom; and yet the late Duke of *Richmond* claimed the Honour or Dignity of a Peer of *France*, as Lord of *Aubon*, but that was a Title rather annexed to the Tenure of that Seigniory than otherwiſe.

Co. 4. *Inſtit. fol.* 4.

Decreed in the grand Eſtate of *Paris*, 1607.

V. de Monmouth Hiſt. of *France*, f. 15.

And though his Majeſty has been pleaſed to confer the Dignity of Dutcheſs of *Portſmouth* on the Lady *Carwel*, yet the ſame is rather Honorary than a Title conſiſtent with the Laws of *England*: For though his Majeſty is the Fountain of Honour, and may call the meaneſt of his Subjects to the higheſt of Dignities, yet it is their Civil qualifications which make them capable of injoying the Immunities and Priviledges of Peers; but that flows from another Fountain, even the Law of the Realm, which as to Denizens diſable them to take ſo ſignal a mark of Sovereignty without Act of Parliament.

CHAP. IV.

Of Aliens and Tryals *per medietatem*, where allowed, and where not.

I. *Of the manner of Aliens obtaining Tryals* per medietatem. *at the Common Law, and of the Antiquity of the ſame.*
II. *Of the making the ſame a Law univerſal: within this Realm, as to ſome Perſons, afterwards general, as to all.*
III. *Of the VVrit and ſome Obſervations on the Summons of ſuch an Inqueſt.*
IV. *Of the opportunity loſt or gained by praying this Immunity.*
V. *Of the awarding of Tales upon requeſt on ſuch Enquiries.*
VI. *VVhere this Immunity does not extend to Aliens, and where it does in matters Civil and Criminal.*
VII. *Of the validity of a VVitneſs Alien, and of an Infidel.*
VIII. *The Title of a Renegado.*
IX. *Of the benefit of the King's Pardon, whether it extends to an Alien, whoſe abode is here, but happens to be abſent at the time of the promulgating.*

I. T*Riatio bilinguis* or *per medietatem linguæ*, by the *Common Law* was wont to be obtained by *Grant* of the King, made to any Company of Strangers, as to (*Sanſ. Pl. Coron. lib.* 3. *cap.* 7.) the Society of *Lombards* or *Almaignes*, or to any other *Corporation* or *Company*; when any of them were impleaded, the Moiety of the Enqueſt ſhould be of their own Tongue; this Tryal *per medietatem* in *England* is of great Antiquity, for in ſome caſes Tryals *per medietatem* (*Lamb. fol.* 91.) was before the Conqueſt, *Viri duodeni Jure Conſulti, ſex Walliæ, totidem Angliæ, & Walliæ jus dicanto,* (*Co.* 1. *Inſt.* 155.) and as the Commentator obſerves, it was called *duodecimvirile Judicium*.

II. This Immunity afterwards being found commodious to us *Iſlanders*, became univerſal; for by the (27 *E.* 3. *cap.* 18.) *Statute* of 27 *E.* 3. *cap.* 8. it was enacted, that in Pleas before the *Major of the Staple*, if both Parties were *Strangers*, the Tryal ſhould be by *Strangers*; but if one Party was a *Stranger*, and the other a *Denizen*, then the Tryal ſhould be *per medietatem Linguæ*: But this Statute extended but to a narrow compaſs, *viz.* (28 *E.* 3. *c.* 13.) only where both Parties were *Merchants* or *Miniſters*

of the Staple, and the Pleas before the *Major of the Staple*: But afterwards in the twenty eighth year of the ſame King's Reign it was enacted, **That all manner of Inqueſts, which was to be taken or made amongſt Aliens & Denizens, be they Merchants, or others, as well before the Major of the Staple, as before any other Juſtices or Miniſters**: Although the King be Party, the one half of the Enqueſt or Proof ſhall be *Denizens*, the other half *Aliens*, if ſo many Aliens and Foreigners be in the Town or Place where ſuch Enqueſt or Proof is to be taken that be not Parties, nor with the Parties in Contract, in Plea, or other quarrel, whereof ſuch Inqueſt or Proof ought to be taken; and if there be not *ſo many* Aliens, then ſhall there be put in ſuch Enqueſts or Proofs *as many* Aliens as ſhall be *found* in the ſame Town or places, which be not thereto Parties, as aforeſaid; and the remnant of Denizens, which be good Men, and not ſuſpicious to the one Party or other.

By which *Statute* the ſame Cuſtom or Immunity was made a Law univerſal, although it be in the Caſe of the King, for the Alien ſhall have his Tryal *per medietatem*. But if it be for Treaſon, *e contra. Vide poſtea num.* 5.

It matters not whether the moiety of Aliens be of the ſame Country, as the Alien party to the Action is; for he may be a *Dutch Man*, and they *Spaniards*, *French*, *Walloons*, &c. becauſe the Statute ſpeaks generally of *Aliens*. Dyer 144.

III. The Form of the *Venire facias* in this caſe is, *De Vicineto*, &c. *quorum una mediatas ſit de Indigenes, & altera medietas ſit de alienigenis natis*, &c. And the Sheriff ought to return *twelve Aliens* and *twelve Denizens*, one by the other, with addition which of them are Aliens, and ſo they are to be ſworn; but if this Order be not obſerved, it is holden as a miſreturn. Cro. 3. part 818. 841. Bra. tit. Tryal.

It has been conceived of ſome, that it is not proper to call it a Tryal *per medietatem Linguæ*, becauſe any Alien of any Tongue may ſerve; but that ſurely is no Objection, for People are diſtinguiſhed by their Language, and *medietas Linguæ* is as much as to ſay, half *Engliſh*, and half of any other *Tongue* or *Nation* whatſoever; nor matters it of what *ſufficiency* the

Cro. El. 841. Jurors are, for the form of the *Venire facias* ſhall not be altered, but the clauſe of *quorum quilibet habeat* 4, &c. ſhall be in.

If *both Parties* are *Aliens*, then the Enqueſt ſhall be 21 *H*. 6. 4. *all Engliſh*; for though the *Engliſh* may be ſuppoſed to favour themſelves more than *Strangers*, yet when both Parties are *Aliens*, it will be preſumed they will favour both alike, without any *difference*.

2 Ro. Abr. 643. Where an Iſſue is joyned between a Denizen and an Alien, and a *Veniri facias* awarded *per medietate Lingua*; and the Sheriff returns 12 Denizens and 12 others for Aliens, whereas in Truth there are not 12 Aliens nor 6 Aliens returned: In this Caſe it ſeems that the Alien may challenge the Array, for otherwiſe he hath no Remedy, if he ſhall be concluded by the Sheriffs Return.

Dy. 28. a. in Margine. But if he doth not challenge, and ſo they are impanelled, *&c.* it is ſufficient; yet if eight Denizens and four Aliens are impanelled it is ill, becauſe it appears in this Caſe that the Tryal is not *per medietatem*.

Cro. El. 27[illegible]. If a Writ of Inquiry of Damages be awarded in an Action between a Denizen and an Alien, the Enqueſt ſhall be all of *Engliſh*, and not part of *Aliens*, for it is out of the Statute.

Dyer 28. a. IV. If an *Alien* is party, who ſlips his opportunity, and ſuffers a Tryal by all *Engliſh*, the Judgment is not *Erroneous*; for if he will be ſo negligent as to ſlip that advantage which the Law gives him, it is his (a) Dy. 144. pl. 60. fault; (a) for the Alien, if he will have the benefit of that Law, muſt pray a *Venire facias per medietatem Linguæ, at the time of the awarding the Venire facias*: But if a neglect of that opportunity happens, yet if he prays it after the awarding a general *Venire facias*, 21 *H*. 7. 32. the ſame may be retrieved, ſo as it be before the *Venire* be returned and filed, for then he may have *Venire* (b) Pl. Coron 150. Dyer 357. 2 Ro. A. 643. Cro. El. 562. *facias de novo*, or otherwiſe he cannot, (b) nor can he afterwards challenge the *Array* for this cauſe, if it falls out the Juries are all *Denizens*; though *Sandford* ſeems to be of a contrary Opinion, for the Alien muſt 3 *E*. 4. 11, 12. pray it at his peril, *Heyward* againſt *Lipſon*.

V. If there be a general *Venire facias*, the Defendant cannot pray a *decem Tales*, &c. *per medietatem*

Lin-

Lingua upon this, becauſe the *Tales* ought to purſue the *Venire facias*: But if the *Veniri facias* be *per medietatem Linguæ*, the *Tales* ought to be *per medietatem Linguæ*, as if five Aliens and five Denizens appear on the principal Jury, the Plaintiff may have a *Tales per medietatem*; but if the *Tales* be general *de circumſtantibus*, it hath been held good enough, for there being no exception taken by the Defendant upon the *awarding* thereof, it ſhall be intended well awarded. 10 *Co.* 104. a. *Cro. El.* 818, 841.

If an *Alien* that *lives* here under the protection of the *King* of *England*, and Amity being between both King's commits *Treaſon*, he ſhall by force of the Act of 1 and 2. *Philip* and *Mary*, be tryed according to the due courſe of the *Common Law*, and ſhall not in that caſe be tryed *per medietatem Linguæ*. 21 *H.* 4. *Stamford.* 154. *Hill.* 36. *Eliz.* Dr. *Lopez* Caſe by all the Judges.

But in the caſe of *Petit Treaſon*, *Murder*, *Felony*, &c. if he prays his Tryal *per medietatem Lingæ*, tha Court ought to grant it. *Vide Lord Dyer fol.* 144. the Caſe of *Sherly* where the point is fully handled. *Co. Inſtit.* 3. *part. f.* 27.

Yet if an *Information* be exhibited againſt an *Alien*, and an *Engliſhman*, the Tryal is not *per medietatem*, but according to the *Common Law*. *Moores Rep.* 557. *Barr's* Caſe.

If an *Alien in League* bring an Action (if there be cauſe) the Defendant may plead in abatement; but if it be an *Alien Enemy* he may conclude in the action. *Colrure Coke's* Entries *tit.* Alien

In an Action for words the Defendant pleaded Not guilty, and ſaid he was an Alien born, and prayed Tryal *per medietatem Linguæ*, which was granted, and at the *niſi prius* in *London*, but ſix *Engliſh* Men and five Aliens appeared, and the Plaintiff prayed a *Tales de Circumſtantibus per medietatem Linguæ*, and it was granted, ſo there wanted one Alien, and the Record was: *Stam.* 160. B. 27 *Ed.* 3. *cap.* 8. 28 *Ed.* 3. 13. 2 *H.* 5. 3. *Dy.* 28. a. in *Margine*

Ideo alius Alienigcueia de Circumſtantibus per Vic. London, *ad requiſitionem infra nominati* Julii Cæſaris, *per mandatum Juſticiariorum de novo appoſitus cujus nomen pannello prædict. affilatur, ecundum formam Statui in hujuſmodi caſu nuper editi & proviſi quiquidem Jurator ſic de novo appoſitus,* viz. Chriſtianus Dethick *Alienigena exactus venit ac in Juratam illam ſimul cum aliis Juratoribus* 10 *Co.* 104. a

Juratoribus prædict. prius impanellatis, & Juratis Juratus fuit, &c. It was found for the Plaintiff, and afterwards moved in Arreſt of Judgment, That no *Tales* was to be granted *de Circumſtantibus*, when the Tryal is *per medietatem Linguæ*, by the Juſtices of *Niſi prius*, by the Act of 35 *H.* 8. becauſe in the Act it is ſpoken of Free-hold of Jurors, and an Alien is not properly ſaid of any Country, or to have any Free-hold; but it was adjudged becauſe the Statute was made for ſpeedy Execution, that it ſhould be expounded favourably, according to the intent and meaning of the Makers of the Act; and though in this caſe the *Tales* was prayed by the Plaintiff, where it ought to have been *ad requiſitionem Defendentis*, yet that ſhould be taken to be but a miſpriſion, and would be amended.

Mich. 35 36. *Eliz. in B. R. Sir Julius Cæſar verſus Philip Corſinſi.*

Dy. 28. *a Margine Cro. El.* 275.

VI. If the Plaintiff or Defendant be *Executor* or *Adminiſtrator*, though he be an *Alien*, yet the Tryal ſhall be by *Engliſh*, becauſe he ſueth in Auter Droit; but if it be averred that the *Teſtator* or inteſtate was an *Alien*, then it ſhall be *per medietatem Linguæ.*

Shely a *Frenchman* who joyned with *Stafford* in the Rebellion, in taking of *Scarborough Caſtle* in the County of *York*, he being taken, was arraigned in the King's Bench upon an Indictment of *Treaſon*, and the Indictment was *contra legiantiam ſuam debitam*; and the Indictment was rul'd to be good, although he was no Subject, becauſe it was in the time of Peace between the *Queen* and the *French King*. But if it had been in the time of *War*, then the Party ſhould not have been *indicted*, but *ranſomed*. It was likewiſe ruled there, that the Tryal was good, although the *Venire facias* awarded in *York* was general, and not *de medietate Linguæ*; for ſuch Tryal *per medietatem Linguæ* does not extend to *Treaſons*, and the Indictment ought to omit the words, *Naturalem Dominam ſuam*, and begin that he intended Treaſon *contra Dominam Reginam*, &c. *Hill.* 36 *Eliz. in B. R. Stephano Ferrara de Game*'s Caſe in Dr. *Lopez.* Treaſon.

7 *Co.* 6. b.

Dyer. 145. *Hob.* 271. *Salk.* 633.

If an *Alien Enemy* come into this Realm, and be taken in *War*, he cannot be indicted of *Treaſon*, for the

7 *Co.* 6. b.

ſe Indictment cannot conclude *contra legantiam ſuam ebitam*, for he never was in the protection of the ing; and therefore he ſhall ſuffer death by *Martial aw*, and ſo it was rul'd in 13 *H.* 7. in *Perkin Wareck*'s Caſe, who being an Alien born in *Flanders*, eigned himſelf to be one of the Sons of King *Edward* e Fourth, and invaded the Realm, with intent to ake upon him the Dignity; who had his Judgment nd Tryal by *Martial Law*, and not by the *Common Law* of *England*. Sir *John Davies* Conqueſt of *Ireland*, fol. 103, 104, 105.

VII. The Kingdom of *Ireland* was a Dominion eparated and divided from *England* at the firſt, and ame to the Crown of *England* by *Conqueſt*, in the time f *Henry* the Second; and the meer *Iriſh* were as *Aiens*, *Enemies* to the Crown of *England*, and were iſabled to bring any action, and were out of the protection of the Laws of this Realm; and five *Scepts* of the *Iriſh* Nation were only enabled to the Laws of *England*, viz. *Oneil de Ultonia*, *O Mollogblin de Media*, *O Connoghor de Connacia*, *O Brian de Tholmonio*, and *Mac Morough de Lagenia*, as appears by the Records of the Dominion of *Ireland*, and ſeveral Grants have been made to the *Iriſh*, which proves them to be meer Aliens. But afterwards, though the ſame was a ſeparate and divided Kingdom, yet whilſt they were under the ſubjection and obedience of the Kings of *England*; if *High Treaſon* had been committed by an *Iriſh-man*, he might be arraigned, indicted, and tryed for the ſame within *England*, and by the *Laws* of *England*; and ſo it was reſolved by all the Judges of *England* in *Oruck*'s Caſe, 33 *Eliz.* and alſo in Sir *John Perrot*'s Caſe, That *Ireland* was out of *England*, and yet that all *Treaſons* committed there, were to be tryed in *England*, and that by virtue of the Statute of 38 *H.* 8. *cap.* 23. *Arthur Crohagen*, an *Iriſh* Man, was arraigned, for that he being the King's Subject, at *Lisbon* in *Spain* uſed theſe words, *I will kill the King (inuendo Dominum Carolum Regem Angliæ) if I may come unto him, becauſe he is a Heretick*; that afterwards he came into *England*, and was taken, and tryed by a Jury of *Middleſex*, and was found guilty; *Co.* 7. *fol.* 23. *Calvin*'s Caſe. *Cro. Car.* 332.

guilty; and it was held High Treaſon by the courſe of the *Common Law*, for his Traiterous intent, and imagination of his heart is declared by theſe words, and within the Statute of 25 *E.* 3. he confeſſeth he was a *Dominican Fryar*, and Prieſt in *Spain*.

14 *Eliz.* in the Caſe of the Duke of *Norfolk*, Co. *Inſtit.* 4. *pt. fol.* 279. *Bracton* ſays, that an Alien born cannot be a Witneſs; but that is to be underſtood of an *Alien Infidel*; for the Biſhop of *Roſſe*, being an Alien born (a *Scot*) was admitted to be a Witneſs, and *ſworn*.

*11 *H.* 8. *fol.* 4. Yet an *Infidel* may bring an Action againſt another Merchant or any other however *, and that without controverſie.

The teſtimony of a *Renegadoe* is not to be received at this day, by the Laws of any *Chriſtian Kingdom* or *Republick*; he that hath once renounced his *Faith* can never be believed, therefore he cannot be a Witneſs; and ſo it was rul'd where one *Domingo de la Cardre*, a *Renegadoe*, who was ſworn, and gave evidence; afterwards a new Tryal being granted, his Teſtimony was rejected, and he not ſuffered to be ſworn, it being at his Tryal proved, that he was a *Spaniard, and a Chriſtian by Birth and Education, and after became a Jew*.

Hill. 17. 18. *Car.* 2. *in B. R. Robles verſus Langſton.*

Hobart, fol. 271. *Courten's* Caſe. If an *Alien be reſident*, and commits an offence, he ſhall have the benefit of the Kings *general Pardon*; but if he is *not in the Kingdom* at the time of the Pardon promulgated, then he loſes the benefit of the ſame; for he is no otherwiſe a Subject, *but by his Reſidence here*.

CHAP.

CHAP. V.

Of Planters.

I. *Of Poſſeſſion and its Original Right.*
II. *Of Vacancies natural, which give a right to Planters.*
III. *Of Civil Vacancies, how far the ſame might be poſſeſſed.*
IV. *Of Perſons expelled, whether juſt to deny ſuch to plant in places vacant.*
V. *Of Planters, whether they have a firm right, ſo as to diſpoſe by Will, or only a Uſufructuary poſſeſſion.*
VI. *Of Planters, wanting things neceſſary for the ſupport of humane life, generally conſidered according to the Laws of Nature.*
VII. *Wherefore one Man may naturally have more than another, and what conditions are annexed to ſuch fortunes, for thoſe that are in neceſſity.*
VIII. *Whence it is that there was at the beginning, and is ſtill a tacite condition of reaſſuming our Original rights, in caſe of extreme or natural neceſſity for natural Community.*
IX. *Of neceſſity conſidered in a Chriſtian Community.*
X. *Of the Primitive Communion, conſidered in reference to its reſtrictions and limitations.*
XI. *Of thoſe things that are dedicated to God, and holy uſe, whether ſubject to the relief of our neceſſity.*

I. HAving in the firſt Chapter of this Book diſcourſed of the Original of Property deducing its inception, to that which we call poſſeſſion or *meum*, and how the ſame may be altered by War, it may not ſeem unneceſſary to diſcourſe of the acquiring of Property in the new diſcoveries of thoſe vaſt Immenſities of *America*, which being prepoſſeſſed, ſeem to deny us legally that Title which we pretend to. *Aſcham fol.* 15

Poſſeſſion by Law, is eſteemed the higheſt Title that Men can pretend to what they enjoy, which is nothing elſe but *poſitio pedis*; as if the Ancients had no other Seal to confirm their Tenures, but the prints of their Feet: And good reaſon, ſeeing the mind is not able to take up a place ſo well as the body; for many Mens Wills may concur in (wiſhing and liking) the ſame thing, but many bodies cannot concur

cur to the poſſeſſing it: Beſides the mind cannot ſe[t] an outward mark on what it likes, that thereby o-thers might be warned to abſtain from it, all which the body properly doth. *Abraham* and *Lot* going to plant, declared no more than this, *there was room or vacancy enough*; and therefore, without further examination or ſcruple, they knew they might turn to the right hand or to the left, to poſſeſs what they would to themſelves.

II. This Vacancy, which gives us a right to plant, is to be conſidered in two reſpect, 1. Natural, 2. Civil: The firſt is in things which may be poſſeſſed, but actually are not, neither in property, nor uſe; ſuch a Vacany which is *nullius in bonis*, might be occupied by *Switzers*, who, as *Cæſar* ſaith, would fain have changed their rough Hills for ſome nearer *Campania*; and Deſarts or places uninhabited may be poſſeſſed and appropriated to the firſt Planter, and that without all controverſie, but eſpecially by thoſe who being expulſed from their own Seats or Eſtate, ſeek entertainment abroad: The *Anſebarians* in *Tacitus*, cry out, *As the Heaven to the Gods, ſo is the Earth granted to Mortals, and what is void is publick*: Looking up to the Sun and Stars, they did openly as it were inquire of them, *Whether they were pleaſed in beholding any ground empty, and without Inhabitants, they ſhould rather caſt forth the Sea, and overwhelm the Spoilers of the Earth.*

Tacitus Annal 13.

III. Civil Vacancy, is where it is not abſolutely incorporated, as among the roving *Arabians* and *Moors* in *Barbary*, and other *Africans* and *Americans*, who poſſeſs one place to day, and another to morrow; theſe by their frequent returns, ſhew that they abandon not the places they remove from, as *derelicta quæ quis in bonis amplius numerare non vult*; we cannot ſay, that their natural or voluptuary intereſt in them is no way improved; for *Grotius* ſeems to be of Opinion * That if there be ſome Deſert or barren ground, the ſame ought to be granted to Strangers upon their requeſt, and, ſays he, *It is alſo rightly ſeized on by them*, giving this reaſon, *For that Lands ought not to be eſteemed occupied which are not cultivated*; but

Ubi nec poſſeſſo eſt plene in homine, nec homo plene in poſſeſſione.

* *De Jure Belli ac Pacis lib.* 2. *cap.* 2. §. 17.

ut only as to the Empire, which remains entire to the firſt People, they do no offence who inhabit, and manure a part of the Land that lyes neglected †. † Dion. Pruſæenſes, Orat. 5.

But we muſt preſs this Argument of *Grotius* very tenderly, leſt by the ſame reaſon others conclude, that thoſe Eſtates which are not competently improved, are derelict and occupiable by others, which would introduce perpetual confuſions, and eaſily perſwade every Man that he could husband his Neighbours Lands better than himſelf: However this is a clear caſe for all Planters, that thoſe Waſtes, or *aſperi montes*, which the Natives make no uſe of, nor can receive any damage by their being poſſeſſed by others, may lawfully be impropriated by them. *Recte facta eſt conceſſio, quæ eſt ſine damno alterius.*

IV. Again, if a Nation or People expelled their own Country, ſhould deſire to ſeek void places, or at leaſt ſuch as might not abſolutely endamage a People into whoſe Territory they come, they may juſtly plant; the reaſon is, for that Dominion or Property might be introduced with a reception of ſuch uſe which profits * ſuch diſtreſſed People, and hurts not thoſe; and therefore the Authors of Dominion are ſuppoſed willing rather to have it ſo; but to give away that which we have but a bare right to and no poſſeſſion, can neither be juſt in the giver, nor lawful in the receiver. We have an eminent Example of this amongſt the *Turks*; for the *Tartars* having overrun the North of *Aſia*, and many Nations, fled from their own Countries for fear of them, amongſt other the *Coraſines* a warlike People, being thus unkennelled, they had their recourſe to the *Sultan* of *Babylon*, and petitioned him to beſtow ſome habitation upon them; their Suit, according to the Rules of Policy, he could neither ſafely grant nor deny; to admit them to be Joynt-tenants in the ſame Country with the poſſeſſed *Turk* would turn to a preſent inconvenience and a future miſchief, and to deny them, might perhaps edge their diſcontents into deſperateneſs; therefore inſtead of giving them Gold, he ſent them to the Mines, yet ſo as they took it as a very great courteſie; for he beſtowed on them all the Lands which

Bald. 3. Conſ. 293.

* Serv. ad 7. Æn. *Littuſq; rogamus innocuum, cujus vindicatio, ait, nulli poſſit nocere.*

Matthew Paris, fol. 851.

which the Chriſtians held in *Paleſtine*, liberally to give away what was none of his, and what the others muſt purchaſe before they could enjoy: Sad was the Donation; for by virtue of that conveyance they became Conquerors of *Jeruſalem*, and of the whole ſtrength of the Chriſtians.

Matthew Paris fol. 834, 835.

V. But admitting that Planters may apropriate a Plantation for their living, whether ſuch may diſpoſe of the ſame by Will (we ſuppoſing the Poſſeſſor having no Heir) for that he might ſeem to have but an uſufructuary poſſeſſion, till a deſcent had been caſt, which then perhaps may turn the ſame into a Right: † Without all controveſie the very immediate poſſeſſing and planting creates a right againſt all, but he that hath Empire there, and that very right the Party in his life time might have actually transferred over to another. Now though the deviſe in the Will operates not till after his death, yet the gift is made during his liſe; according as the *French* have it, *Se deſpouiller avant que s'en aller coucher*, that is, Man firſt puts off his cloaths, and then goes to bed.

† As it is conſonant to Nature that my ſhare of ſubſiſtence, which was before uncertain, ſhould now be fixed, ſo it is neceſſary that the conſent which others gave to this at firſt, ſhould ſtand fixed, eſpecially if there was no obligation, or declaration at the firſt to the contrary. *Vide Selden de Jure Nat. & Gen. ad mo. Heb. id. obligat. quod eſt ex officio quod legis eſt*: But the ſanction of a Law ſuppoſes the nullity of a State of nature, not of a right of nature.

VI. Again, Perſons having arrived in thoſe Territories, and planted, but before they have reapt the fruits of their labour, neceſſity is found within their Huts, and a ſupply of things for the ſupport of humane life is wanting, whether ſuch may ſeek the means of ſubſiſtence by the Laws of Nature, and in caſe of refuſal (after requeſt) force them from their Neighbour Planter? Surely that which is neceſſary for any natural ſubſiſtence, and neceſſary to another, belongs juſtly to me, unleſs I have merited to loſe the life which I ſeek to preſerve. There were a defect in Gods creating our natures, ſuch as they are, if he did not provide means to uphold their beings, according to the natural faculties which he hath given them. A good Mother divides her bread among her Children, ſo as a morſel may come to each;

Pia materanem inter liberos diſtribuit, ut fructus veniat ſingulis.

tch; let us therefore judge this caſe by thoſe rules f Juſtice, by which we judge other caſes: If a Faher in his Will paſs by a Child or names him, but pon falſe cauſes leaves him nothing, he is notwithanding by the equity of the *Civil Law* admitted ɔ a Child's part, *à legitima*, and may form his Acion *contra Teſtamentum inofficioſum.* Men are all a Kin, nd we derive one from another, and to let others ettle in our places, who may juſtly expect as much ue to them, for their natural ſubſiſtence, as was to hoſe who before went out of the World, to make lace for them, yea though they aſſign them nothing t their departure.

Man were of all living Creatures moſt miſerable f he might not during this life have that meaſure, which God would not have an Ox defrauded of; hus hath every Dunghil-Fly a right to live, and to emain inſectile, which beſides exiſtence hath ſenſe, and may not juſtly be deprived of that its chiefeſt elicity, unleſs it be importunate to a nobler Creature.

VII. 'Tis very true that no Man can pretend to ſhare in the Sweat of another Man's Brows, or that the Pains, and waſting of another Man's life ſhould be for the maintenance of any but his own; nay though it be granted, that thoſe Neighbour-planters, who being ſetled before us, and having acquired either by Induſtry, or lawful donation, the fruits of other Men's labours, and conſequently muſt enjoy more Plenty than a new Comer or Planter, yet all that they poſſeſs is not properly theirs; for if another by extreme neceſſity be periſhing, and they have above what they can conſume in a natural way, then they have no fuller a property in that plenty than Stewards have, and for this regard they are ſo called in Scripture: *The Earth ſtill is the Lords, and the fulneſs of it is his, for he made it of his own matter, and for the Faſhion of it uſed not our aid; yea, 'tis his Sun which ſtill produces, and his Clouds which drop fatneſs:* We can only pretend the contribution of a little pains for that which is our natural ſhare; ſo that in plain reaſon we may not expect to be otherwiſe qualified

Xenphon in the Anſwer to the *Cynopenſes:* *Ubi jus emendi nobis non conceditur ſive in Barbarico, ſive in Græcanio ſolo ubi quæ opus ſummus, non per vim, ſed ex neceſſitate. Exped. Cyri.*

than Stewards, for all that which is not probably ne-
ceſſary for our own ſubſiſtence, or for theirs, who
ſubſiſt only by us: Wherefore if *Lazarus* ready to pe-
riſh (not by fault, but by misfortune) had taken
Dives his Crumbs, contrary to his will; yet he had
ſinned no more than he who takes ſomething
which the Lord or Maſter hath given him, though
the Steward contradict it: But if it ſo happen, that
both the Planters are *in pari neceſſitate*, then *melior
conditio poſſidentis*; or, as St. *Paul's* words are, when he
excited the Churches Charity and Alms, for the re-
lief of the diſtreſſed Members of Chriſt, *Not* (ſaith
he) *that we ſhould be ſtraitned, and they bound.*

Leſſius, lib. 2. cap 12. dub. 12. num. 70.

2 Cor. 8. 13.

VIII. The will of thoſe who firſt conſented mu-
tually to divide the Earth into particular poſſeſſions
was certainly ſuch as receded as little as might be
from natural equity; for written Laws are, as near
as poſſible, to be interpreted by that; and therefore
in caſes of ſuch extremeties we are not without ex-
amples, of taking the Goods of one to ſupply the ne-
ceſſities of many: And therefore at Sea, if Proviſions
begin to fail in a Ship, every one may be forced to
bring out openly, what he laid in for his paſſage in
particular; ſo a Ship at Sea, having in ſtreſs of
Weather, ſpent her Sails, Cordage, and Anchors,
meeting other Veſſels at Sea, may take a ſupply
of ſuch as ſhall be wanting; but yet governed
according to St. *Paul's* words, *So that ſuch taking
ſtraitens not the other Ship.* So when the Sea
breaks in upon a Country, we may dig in the next
Mans grounds to make a Bank, without ſtaying for
the Owners permiſſion, yea, tear down any Man's
Hedge, or Fence, when the common paſſage is ſtop-
ped: For in ſuch caſes of neceſſity humane Laws
(as is mentioned afore) do not ſo much permit as
expound their natural equity, and that which Men
give to thoſe who are ſo innocently diſtreſſed, who
borrow life, only from the ſhadows of death; *Sub
picta ſe tempeſtate tuentur*, is not ſo properly a Charity
to them as a Duty; and if he be a Chriſtian that gives,
perhaps he doth more Charity to himſelf than to the
Receiver.

Grotius de Jure Belli ac Pacis lib. 2. cap. 2. §. 7, 8, 9.

Leges humane obligant uti facta ſunt, ſcilicet cum ſenſu humane imbecillitatis.

IX. T

IX. The reaſon of this Chriſtian Charity or Com-ɪunion, is as far above the the natural, as Chriſt him-elf was above Nature; this requires an equal beat-1g of all Pulſes, that as Fellow-Members we have *homogeneal* ſenſe and palpitation; we are to divide Cruſe of Oyl, and a few handfuls of Meal, with 1e of Chriſt's Flock, with an abandoned Creature; nd what can be in more extremity than a poor Plan-er in a ſtrange place, deſtitute for the preſent apports of humane life?

Nequicquam fundo ſuſpiret nummus in imo.

And ſurely the violation of this *Jus Charitatis*, is o leſs than theft in thoſe who having extended for-unes, never defalcate a *Gibeonite*'s Cruſt perhaps for wandring Angel; theſe ſteal even the ſhipwrack'd Man's picture from him, which as his whole inheri-ance he carried at his back, to move compaſſion, and y the inſatiable Sea of their Avarice and Luxury, hey wreck him over at Land.

X. But this free primitive Communion had, and hath its bounds, and its *quantum* in Contributions, as well as the natural, otherwiſe it might be fraudu-lent, and thieving: For they who poſſeſs but a lit-tle, would contribute it all, on purpoſe to ſhare e-qually with thoſe who poſſeſs very much, which would introduce a viſible decay and ruine in all; as *Tiberius* rightly obſerved * on *M. Hortalus* his petiti-oning an Alms for *Auguſtus Caſar*'s ſake, *Idleneſs would increaſe, and Induſtry languiſh, if Men ſhould entertain no hope, nor fear to themſelves, but ſecurely expect other Mens relief, idle to themſelves, and burdenſom to us?*

* *Intenditur inquit, ſocordia langueſcet induſtria, ſi nullus ex ſe metus aut ſpes, & ſecuri omnes aliena ſubſidia expectabunt, ſibi ignavi, & nobis graves.* Tacit.

Wherefore in the midſt of that primitive Com-munion, we find that the Apoſtles went *domatim*, from houſe to houſe breaking of bread, therefore they even then retained by their houſes in property; which property is ſuppoſed by the eighth Command-ment, as well as it is by Chriſtian Charity: For no Man can ſteal, but by invading the right of another; and as for Charity, it is neceſſary he have ſomething of his own, to be able to fulfil its commands, and to make a dole at his door; and it is very conveni-ent that he give it rather with his own hand, than by ſome publick Collectors, *For Charity is hated moſt*

Mat. 7. 11. *with the ſenſe of its own action.* Moreover under the Law, Jews were commanded *to love one another as themſelves*; yet this Command took not away Property then, therefore it takes it not away now; notwithſtanding we owe the uſe or uſufruct of our Properties to the diſtreſſed, though our ſelves be at the ſame time in diſtreſs, juſt as we are commanded, by the peril of our own lives, to endeavour to ſecure our Neighbours life, which is yet a Charity more tranſcendent than the other, by how much life is above a livelihood. And though the various Laws of Countries have variouſly provided puniſhment for thoſe, who out of meer neceſſity take ſomething out of another's plenty; yet that proves not the act to be ſin, or repugnant to equity or conſcience, but rather repuguant to the convenience of that Kingdom or Republick where the act is committed; and the true reaſon of the ſame is, leſt thereby a gap might be laid open to Libertiniſm; beſides, reaſon of State, we know, conſiders not Vertue ſo much as publick quiet and conveniency, or that Right which is *ad alterum.*

XI. We will now conſider thoſe things which are God's, which yet are not his in ſuch a ſtrict rigorous ſenſe, but that they lie open to the exceptions of our juſt neceſſities; hence that which is devoted as a Sacrifice to him, in caſe of neceſſity, may be made our dinner, witneſs the action of *David*: Wherefore the conſequence of our Saviour's Anſwer was very ſtrong, when he defended his pulling the Ears of Corn in another's Field: That if it was lawful for *David* in his neceſſity to eat that bread, which was provided for the Table of God, then how much more was it lawful for him and his Apoſtles in their neceſſities to take a refreſhing out of that which belonged to Man? By the *Canon Law*, if no other means can be found, the Veſſels of the Altar may be ſold to redeem thoſe Souls who are enthralled in miſery and *Captivity*; and is there not good reaſon for it, ſeeing they ſerve but for the Souls of Men, and therefore the Souls of Men are more precious than they? Yea the Sacrifice it ſelf, to what

Decretals of *Gratian, lib. Synodus Nicænenſis, Can. Synodus Aureliacenſis, Can. Concilium Toletanum.*

what end is it, but to obtain a ſtate of Piety for us?

Upon what hath been ſaid, it may not ſeem an Injury, if a Planter (wanting thoſe things for the ſupport of humane life) requeſting a reaſonable proportion of his Neighbour (having it to ſpare) with an intention to repay, if denied, by force to take the ſame from him; for that reaſon which creates a puniſhment in a ſettled Common-wealth, for the like actions, does in ſuch places fail.

Grotius de Jure Belli ac Pacis lib. 2. cap. 2. §. 8, 9.

CHAP. VI.

Of the Jews.

I. *Of Conſiderations touching their various and ſeveral Forms of Government down till their total extirpation.*
II. *Of their firſt coming into* England, *and when.*
III. *Of their ſtate and condition after their inhabiting here.*
IV. *Of their Privileges and other Immunities in reference to their Monies and Charters.*
V. *Of their Cheſts and Stars, and the manner of proceedings for the recovering of their debts.*
VI. *Of their Charters and Immunities, and of the confirmation of the ſame.*
VII. *Of the Conſequences and Inconveniences that fell and were occaſioned by reaſon of their Courts, as to the Eccleſiaſtical Cognizance.*
VIII. *Of their power in erecting of Synagogues, and of the foundation of the Houſe of Converts, now called the Rolls.*
IX. *Of their Charter obtained of the Prieſthood of all the Jews of* England.
X. *Of Places totally exempted in* England *from their Sojourn.*
XI. *Of the Endowment of their Wives according to the Law of the Jews, and of their power of Excommunication of each other.*
XII. *Of the real ſtate and condition that they remained in, notwithſtanding all their various and ſeveral immunities.*
XIII. *Firſt, in reference to their Perſons, being obliged to wear Badges or Tables on their Breaſts, as notes of diſtinction, and having entred the Realm, could not depart without Licence.*
XIV. *Secondly, as to their Eſtate, the ſame being ſolely at the will of the King; for at their death the ſame eſcheated; they could ſue without leave or licence, the King might reſpite or releaſe the ſame, and have nothing but what was ſolely at the devotion of the State; continued ſo till their total Baniſhment out of the Realm.*

I. Since the remainder of that mighty Nation, which of old were elected a People peculiar, are now by him that firſt choſe them, diſperſed over the face of the Earth, and are become the moſt politick of Traders now extant, having by their Induſtry cemented themſelves into the principal Revenues and Traffick of the Univerſe, but more eſpecially among thoſe Nations who remain in darkneſs and in the

the ſhadows of Death. It might not ſeem improper to examine how their condition ſtood of old in this Nation, what advantages and diſadvantages they brought to this Realm, and how the Laws of the ſame ſtand in reference to the People at this day.

At the firſt the Fathers of their ſeveral Families, and the Firſt-born after them, exerciſed all kind of Government both Eccleſiaſtical and Civil, being both Kings and Prieſts in their own houſes, they had power over their own Families, to bleſs, curſe, caſt out, diſinherit, and puniſh with death, as is apparent by *Noah* towards *Cham*, *Abraham* towards *Hagar* and *Iſmael*, *Jacob* towards *Simeon* and *Levi*, &c. In *Moſes*'s days then did this Prerogative of Primogeniture ceaſe; and as *Aaron* and his Poſterity were inveſted with the right and title of Prieſts, ſo *Moſes* and *Joſhua* governed the People in a kind of Monarchical Authority.

After *Joſhua* ſucceeded Judges, their Office was of abſolute and independent Authority, like unto Kings when once they were elected; but there were long vacancies and chaſms (commonly) between the ceſſation of the one, and the Election of the other; yea, for the moſt part they ſeldom choſe a Judge but in the time of great troubles and eminent dangers, which being over-paſt, he retired to a private life, much ſymbolizing with the *Roman* Dictators, and continued with them according to the computation of ſome 329 years. In the vacancies or diſtances of time between Judge and Judge, the greater and weightier matters were determined by that great Court of the Seventy called the *Sanhedrim*, in which reſpect the Form of Government may be thought Ariſtocratical; Kings ſucceeded the Judges, and they continued from *Saul* to the *Captivity*, that is about 500 years. *Aug de Civit. Dei, lib. 18. cap. 22.*

From the *Captivity* unto the coming of the *Meſſiah*, which is thought to have been 536 years, the State of the *Jews* became very confuſed, ſometimes they were ruled by Vice-gerents, who had not Supreme Authority in themſelves, but as it pleaſed the *Perſian* Monarchs to aſſign them; they were called *Uſher.*

Heads of the Captivity, of which was *Zorobabel* and his Succeſſors down to *Hoſodia*, which were thought to have been of the Poſterity of *David*; ſo likewiſe the other ſucceeding ten chief Governours under *Alexander the Great*, in the laſt of thoſe ten Governments departed from the Houſe of *David*, and was tranſlated to the *Maccabees*, who deſcended from the Tribe of *Levi*, and from them the Sovereign Authority continued to *Herod the Askalonite* his Reign, at which time our Saviour Chriſt was born according to Gen, 49. 10. *Jacob's* Prophecy: *The Scepter ſhall not depart from Judah, nor a Law-giver from between his feet until Shilo* (that is, the *Meſſiah*) *ſhall come*; which Scepter was given to *Judah*, that is, to the Twelve Tribes from the time of *Moſes*, and that it was taken fully from them in *Herod's* time, and given to him who was a * Proſelyte, and no ways deſcended from that holy Stock, for ſuch was *Herod*.

* A Jew is a name of profeſſion, not of Country or Nation. *Joſeph Scaliger ex quo Caſaubon, adv. Baron pag.* 19. & 39. *Ibid.* 568, 569.

Their condition ſince the extirpation of their Commonwealth, and their diſperſing over the face of the whole Earth, after the ſacking of their Metropolis, is fully related by *Joſephus*, *Euſebius*, and others, and what condition, and how uſed in moſt Nations they have been ſince then, is fully illuſtrated by *Heylin* in his Microcoſm.

II. When they came firſt into this Realm is not certainly related by any of the Hiſtorians in their Writings of *Britiſh* or *Saxon* King's Reigns; however this certainly appears, that *William the Conqueror* tranſlated the *Jews* in *Roan*, from thence to *London*, *ob numeratum pretium*, for a ſumm of Money given by them to him, who accordingly appointed them a place to inhabit and trade in, which being aſſigned them, they were under the Protection and Patronage of the King, and as his meer Vaſſals, their Perſons and Goods being his alone, and that they could diſpoſe of neither of them without his Licence; and this appears by that ancient Law related by Sir *Henry Spelman*.

Holinſhed. Vol. 3. *pag.* 15.

Concil. 623.

De *Judæis* in Regno conſtitutis.

Sciendum eſt quoque, quod omnes Judæi ubicunque *Spelman Concil. 623.*
in Regno ſunt, ſub tutela & defenſione Domini
egis ſunt; nec quilibet eorum alicui diviti ſe po-
ſt ſubdere ſine Regis licentia. Judæi, & omnia ſua
egis ſunt. Quod ſi quiſquam detinuerit eis pe-
uniam ſuam, perquirat Rex tanquam ſuum pro-
rium, (or detinuerit eos, vel pecuniam eorum,
quirat Rex ſi vult, tanquam ſuum proprium)
s Sir *Henry Spelman* renders it.

III. Theſe People after they had planted themſelves n this Iſle, and being thus protected, drove on the Trade and Traffick of the ſame with a mighty hand to ſuch a height, that by the end of King *Rufus's* time, they became powerful, rich and numerous, and to that degree ſo zealous for their Religion, that they not only held open Diſputes, but endeavoured to bring over by Monies the poor and needy to be of their Opinion. So high and inſolent were they *Joh. Bromton, Col. 1048.* grown up in a ſhort time, which continued till King *Henry* the Second's Reign, at which time their condition became a grievance to the Nation, by reaſon of their Oppreſſions, Murders, and Inſolencies, *Gervaſius Dorobernenſis in his Chronica, Col. 1043.* which that King taking into conſideration, baniſhed the wealthieſt of them, and the reſt he fin'd at 5000 Marks. The moſt pernicious act of Murder which they were accuſed of, was, That Generally on a Good *Friday* they would, if poſſible, get a Child of Chriſtian Parents, and crucifie him in deriſion of his Religion. *Fox Vol. 1. fol. 305.*

IV. King *Richard* after his return from the *Holy Land*, taking into conſideration the neceſſities and ſtraits that that expenſive Expedition had reduced him, and being deſirous to reduce the Monies and Eſtates of the *Jews* into ſuch a condition, as if neceſſity ſhould compel him, to ſeize on the whole; but before the ſame could be done, it was propounded that the King declaring his being ſenſible of the ſtate and condition of the *Jews*, a means might be found out for the ſetling and peaceable driving of *Matthew Paris, fol. 641. Rot. Pat. 41 H. B. m. 4.*

Commerce

num. 6. Cok. 4. *Inſtit. fol.* 254. *Joh. Brompton, Collect.* 1258. *Hollinſhed Vol.* 3. *pag.* 155.

Commerce beetween the Chriſtians and them; whereupon Judges were appointed to hold Courts touching the Government of the *Jews*, and their Commerce was appointed out in theſe words:

All the Debts, Pawns, Mortgages, Lands, Houſes, Rents and Poſſeſſions ſhall be regiſtred, the Jew *who ſhall conceal any of theſe, ſhall forfeit to the King his Body, and the concealment, and likewiſe all his Poſſeſſions and Chattels; neither ſhall it be lawful to the* Jew *ever to recover the concealment; alſo ſix or ſeven places ſhall be provided, in which they ſhall make all their Contracts, and there ſhall be appointed two Lawyers that are Chriſtians, and two Lawyers who are* Jews, *and two legal Regiſters, and before them and the Clerk of* William *of the Church of S.* Maries, *and* William *of* Chimilli ſhall their Contracts be made, and Charters ſhall be made of their Contracts by way of Indenture, and one part of the Indenture ſhall remain with the Jew ſealed with this Seal, to whom the Money is ſent, the other part ſhall remain in the Common Cheſt, wherein ſhall be three Locks and keys, whereof the two Chriſtians ſhall keep one key, and the two Jews another, the Clerks of William of St. Maries Church and William of Chimilli ſhall keep the third; and moreover there ſhall be three Seals to it, and thoſe who keep the Seals ſhall put the Seals thereto. Moreover the Clerks of the ſaid William, and William ſhall keep a Roll of the Tranſcripts of all the Charters; and as the Charters ſhall be altered, ſo let the Roll be likewiſe; for every Charter there ſhall be 3 *d.* paid, one moyety thereof by the Jew, and another moyety by him to whom the moyety is ſent, whereof the two Writers ſhall have 2 *d.* and the Keeper of the Roll the 3 *d.* and from henceforth no Contract ſhall be made with, nor any payment made to the Jews, nor any alteration made of the Charters but before the ſaid Perſons or the greater part of them, if all of them cannot be preſent, and the aforeſaid Chriſtians ſhall have one Roll of the debts and receipts of the payments which from henceforth are to be made to the Jews, and the two Jews one, and the Keeper of the Roll one. Moreover every Jew ſhall ſwear upon his

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…oll, that all his Debts and Pawns, and Rents, and all his Goods and Poſſeſſions he ſhall cauſe to be enrolled, and that he ſhall conceal nothing, as is aforeſaid; and if he ſhall know that any one ſhall conceal any thing, he ſhall ſecretly reveal it to the Juſtices ſent unto them, and that they ſhall detect and ſhew unto them all falſifiers and Forgers of Charters, and Clippers of Monies, when and where they ſhall know them, and likewiſe all falſe Charters.

This Cheſt was called *Arca Chirographica*, or *Chirographorum Judæorum*, and the Notaries and Regiſters of them ſtiled, *Chirographi Chriſtiani* and *Judæi Arca Chirographica London*, *Oxon.* Or other ſuch City where ſuch Cheſts were uſually kept, all their Deeds, Obligations, and Releaſes were uſually called Stars and *Starra*, *Starrum*, *Star* in our Latine Records, from the Hebrew word (as Mr. *Selden* obſerves *Shetar* contracted by the omiſſion of *He*) which ſignifieth a Deed or Contract. Theſe Stars were for the moſt part writ in the Hebrew Tongue alone, or elſe in Hebrew on the one ſide or top of the Parchment, and in Latin on the other ſide or bottom of the Deed after the Hebrew.

See *Purchas's* Pilgrimage, *l.* 2. *c.* 10. §. 7.

It's conceived the Star-Chamber was the old Receipt where the Cheſt for *Weſtminſter* remained with the *Stars* of that City, and not ſo called, as it is mentioned, *Co.* 4. *Inſt.* 66. Some of them are now extant in the Treaſury of the Exchequer in King *Johns* Reign.

If any Chriſtian, became indebted to any *Jew* by ſuch Star or Writing put up and reſerved in his Cheſt, and paid not his Money at the day appointed, together with all the Intereſt where any Intereſt was reſerved, then he ſued forth Letters by way of Proceſs againſt him both for the Debt and Intereſt under the Notaries or Regiſters hand, to appear before the Juſtices eſpecially appointed for the Government and Cuſtody of the *Jews* to recover the ſame; but yet ſuch *Jew* could not obtain ſuch Licence till he had paid a Fine to the King for the obtaining of ſuch Letters, *unum Baſantum*, *viz. Beſantum* for every pound, and ſuch *Stars* were in the nature of Judgments, upon which Extents were ſued forth, and the Lands of the Debters were ſeizable notwithſtanding, in whoſe hands ſoever they came, after the Star was entred into *: And if it happened, that any Perſons denied their Deeds, or any Controverſie did ariſe upon which there was any Tryal, the ſame was by a Jury half of Chriſtians, and the other of ſix legal *Jews*.

Vide Fine Rolls 6 *Johan. m.* 17. and likewiſe in *H.* 3. & *Ed.* 1.

* Fines 9. *Joh. memb.* 5.

Such

Such Stars or Cheſt-Judgments were aſſignable to Chriſtians, together with the Extents upon them, and the Aſſignee might vouch over the Aſſignor to Warranty in ſuch caſe. So likewiſe to the King they might aſſign over Debts to pay their Taxes.

Pat. pars 2. An. 3 Hen. 3. m. 8.

VI. As this Politick Prince had provided this means for the diſcovering of their Eſtates, ſo did he from time to time award Commiſſions to Juſtices for the Tryal of Cauſes and Controverſies that aroſe between Chriſtian and *Jew*, and granted them divers Liberties and Privileges, which afterwards were confirmed by theſe two enſuing Charters of King *John*.

Chart. 2. Joh. n. 49. Charta Judæorum Angliæ.

JOhannes Dei gratia, &c. Sciatis nos conceſſiſſe omnibus Judæis Angliæ & Normaniæ, libere & honorifice habere reſidentiam in terra noſtra & omnia illa de noſtris; & omnia illa quæ modo rationabiliter tenent in terris & feodis, & vadiis akatis ſuis & quod habeant omnes libertates & conſuetudines ſuas ſicut eas habuerunt tempore prædicti Regis H. Avi patris noſtri, melius & quietius & honorabilius, Et ſi querela orta fuerit inter Chriſtianum & Judæum, ille qui alium appellaverit ad querelam ſuam dirationandam, habeat Teſtes, ſcilicet legitimum Chriſtianum & Judæum. Et ſi Judæus de querela ſua Breve habuerit, Breve ſuum erit ei teſtis. Et ſi Chriſtianus habuerit querelam adverſus Judæum ſit judicata per Pares Judæi. Et cum Judæus obierit, non detineatur corpus ſuum ſuper terram, ſed habeant homines pecuniam ſuam & debita ſua, ita quod mihi non diſturbetur, ſi habuerit hæredem qui pro ipſo reſpondeat & rectum faciat de debites ſuis & de foriſfacto ſuo, Et liceat Judæis omnia quæ eis apportata fuerint ſine occaſione accipere & emere, exceptis illis quæ de Eccleſia ſunt & panno ſanguine lento. Et ſi Judæus ab aliquo appellatus fuerit ſine teſte, de illo appellatu erit quietus ſolo Sacramento ſuo ſuper librum ſuum, & de appellatu illarum rerum quæ ad Coronam noſtram pertinent, ſimiliter quietus erit ſolo Sacramento ſuo ſuper Rotulum ſuum. Et ſi inter Chriſtianum & Judæum fuerit diſſentio de accommodatione

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ione alicujus pecuniæ, Judæus probatum Catallum ſuum, & Chriſtianus ſuum. Et liceat Judæo quiete vendere vadum, poſtquam certum erit, eum illud unum annum et unum diem tenuiſſe. Et Judæi non intrabunt in placitum, niſi coram Nobis, aut coram illis qui Turres noſtras cuſtodierint, in quorum Ballivis Judæi manſerint. Et ubicunque voluerint, cum omnibus Catallis eorum ſicut res noſtræ propriæ, & nulli liceat eas retinere, neque hoc eis prohibere. Et præcipimus quod ipſi quieti ſint per totum Angliam & Normaniam de omnibus Conſuetudinibus & Theoloniis & modiatione vini ſicut noſtrum proprium Catallum. Et mandamus vobis & præcipimus quod eos cuſtodiatis, & defendatis, & manu-teneatis, & prohibemus ne quis contra Chartam iſtam de his ſupradictis eos in placitum ponat ſuper forisfacturam noſtram ſicut Charta Regis H. Patris noſtri rationabiliter teſtatur. Teſte T. Humf. filio Petri Com. Eſſex, Willielmo de Mareſcal. Com. de Pemb. Henr. de Bohun Com. de Hereford. Robert de Turnham, Willielmo Brywer. &c. Dat. per manum S. Well. Archidiac. apud Marleberg, decimo die Aprilis Anno Regni noſtri ſecundo.

Chart. 2. Johan. n. 53. confirmatio Judæorum de Libert. ſuis.

JOhanes Dei gratia, &c. Sciatis nos conceſſiſſe, & præſenti Charta noſtra confirmaſſe Judæis noſtris in Anglia, ut exceſſus qui inter eos emerſerint, exceptis his qui ad Coronam & Juſtitiam noſtram pertineut, & de Morte hominis & mahemio, & de aſſaltu præmeditato, & de fractura domus, & de raptu, & de Latrocinio, & de Combuſtione, & de Theſauris, inter eos deducantur ſecundum Legem ſuam, & emendentur, & Juſtitiam ſuam inter ſeipſos faciant. Concedimus etiam eis, quod ſi quis eorum alium appellaverit de querela quæ ad eos pertineat, Nos neminem compellemus ad teſtimonium cuiquam eorum contra alium exhibendum, ſed ſi appellator rationabilem & idoneum teſt. m habere poterit, eum ſecum adducat Si quod vero opus ſcelaratum & apertum inter eos emerſerit quod ad Coronam noſtram vel ad Juſtitiam pertineat; ſicut de prædictis Placitis Coronæ licet nulli ſ eorum noſter appellator fuerit, Nos ipſum querelam faciemus per Legales Judæos noſtros An-

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gliæ ſinquiri ſicut Charta Regis H. Patris noſtri rationabiliter teſtatur. Teſte G. filio Petri Com. Eſſex. Willielmo Mareſchallo Com. de Pembr. Hen. de Bohun Com. de Hereford, Petro de Pratell. Roberto de Turnham, Willielmo de Waren, Hugo de Nevil. Roberto de Veteri Ponte. Dat. per manum S Well. Archidiac. apud Merleberg decimo die Aprilis Anno Regni noſtri ſecundo.

Cok. 4. Inſtit. fol. 254.

VII. This Court bing thus erected for the Government of the *Jews*, under colour of the ſame, there were many evaſions found out to avoid the puniſhments which they juſtly acquired for their ſeveral delinquencies; and therefore when any of theſe *Jews* were convicted before any of the Eccleſiaſtical Judges for offences againſt an Eccleſiaſtical Perſon, or for Eccleſiaſtical things, or for Sacriledge, or for laying of violent hands upon a Clerk, or for Adultery with a Chriſtian Woman, the Conuſance of the cauſe was always avoided by the King's Prohibition, becauſe (as was alledged) they had their proper *delegated Judges* who ſhould and ought to have Conuſance of ſuch things; ſo that if a *Jew* happened to be convented before the Judges aſſigned for ſuch things, upon denial of the ſame by the Perſon alone, the ſimple aſſertion of another *Jew* and of one Chriſtian without the adminiſtring of any Oath, they might have purged themſelves, the proof of the Proſecutor being utterly rejected.

Matthew Paris additamenta, fol. 202, 207.

VIII. By the *Canon Law* no *Jew* could build or erect a Synagogue; for if he did, the ſame was ſeizable into the Crown: The like was ſo done in the Year 1231. when they had erected and new-built a curious Structure for a Synagogue, the ſame was taken into the King's hand *, and dedicated to the *Bleſſed Virgin*, and afterwards granted to the Brethren of St. *Anthony* of *Vienna*, and called St. *Anthonies* Hoſpital; but yet an old † Synagogue they might repair.

Decret Gratian lib. 5. Surius Concil. Tom. 3. p. 726.

* *John Stows Chron. fol.* 182.

† *Decret. Gratian. lib.* 5.

King *Henry* the Third finding that many of the *Jews* were converted to the Chriſtian Faith, but yet were notwithſtanding perſecuted by their Brethren, erected a convenient Houſe and Church, with all neceſ-

Matthew Paris Hiſt. Angl. fol. 393.

neceſſary accommodations, and called it by the name of the *Houſe of Converts*, in which place, if any would live a retired life, they had all accommodations granted them for their lives, which place continued a Houſe of Alms and Receptacle for the converted *Jews* conſtantly down till 18 *Ed.* 3. and then there proved a failure of ſuch Converts, and the place became empty and ruinous; whereupon that Prince in the eighteenth year of his Reign granted the ſame Houſe to other poor People who had nothing to live on, with the benefit and accommodation of the Gardens and other things, and an Alms of 1 *d.* a day out of the Exchequer to each poor Perſon: Which place one *William de Bunſtal* being made Guardian of, and likewiſe at that time Maſter of the Rolls, afterwards obtained of that King to annex the ſame Houſe and Chappel of the Converts to the Maſter of the Rolls and his Succeſſors for ever. 51 *E.* 3 *m.* 20.

The Conſtitution of this Society (when it was in being) was purſuant to the *Cannon Law*; for by that it was decreed, reciting: *That in regard the companies of evil Men do often times corrupt even the good, how much more then thoſe who are prone to vices? Let therefore the* Jews, *who are converted to the Chriſtian Faith, have no further communion henceforth with thoſe who ſtill continue in their old* Jewiſh *Rites, leſt peradventure they ſhould be ſubverted by their* Jewiſh *Society.* Therefore **We decree,** *That the Sons and Daughters of thoſe* Jews *who are baptized, and that do not again involve themſelves in the Errours of their Parents, ſhall be ſeparated from their Company, and placed with Chriſtian Men and Women fearing God, where they may be well inſtructed, and grow in Faith and Chriſtian manners.* And further by the ſame Council it was decreed, *That if a* Jew *ſhould have a Wife converted to the Faith, they ſhould be divorced, unleſs upon admonition the Husband would follow.* 4. *Concil. Toledo, Can.* 59, 61, 62. *Grat. Diſt.* 28. *qu.* 1. *c.* 9. & *qu.* 1.

IX. However theſe People having got footing for their Perſons, ſoon obtained Licence notwithſtanding againſt the expreſs Canons, not only for the erecting of Synagogues, but alſo obtained a Charter, whereby was *granted to one* James *of* London, *a Jewiſh Prieſt, the Prieſthood of all the* Jews *throughout all* England, *Rot.* 1 *Reg. Johannis, part* 1. *m.* 28. *Chart.* 17. *Vide Co.* 2. *Inſt. fol.* 508. the ſame at large.

land, to have and to hold it during his life free, quietly, honourably and intirely, without moleſtation, trouble, or diſturbance by any Jew or Engliſhman in the exerciſe thereof, &c. And in the very cloſe of the ſame there is alſo granted That he ſhould not be impleaded for any thing appertaining to him, but only before the King himſelf, or his Chief Juſtice. This Charter was made at *Roan*, from whence the Conqueror firſt tranſplanted theſe People into this Realm.

X. And though they obtained footing in moſt of the great places of *England*; yet ſome there were who obtained ſuch favour as to be exempted of their Company, as *New-caſtle*, to which Corporation it was granted, That no *Jew* from thenceforth ſhould remain or reſide in their Town during the Reign of King *Henry* the Third, or his Heirs; ſo likewiſe they of *Southampton*, *Winchelſey*, *Wicomb*, *Newberry*, *Berkhamſted*, and other Places.

Clauſ. 18 *Hen.* 3. *m.* 16. *Vide Chart.* 18 *H* 3.

If a *Jew* dyed and left an Infant, the Houſe did eſcheat to the Crown, until the ſame was redeemed by the Heir at full Age, and in the *interim* the King might grant the ſame till he came of Age, together with all his Goods, Chattels, Lands, Tenements and Hereditaments, and then upon payment of their Fines they had a ſpecial Writ of Reſtitution awarded to give them actual poſſeſſion.

Clauſ. 5 *H.* 3. *m.* 17. *de dom. Judæorum.*

XI. By the Laws of *England*, if a Man dyed leaving iſſue divers Sons, the Lands deſcended to the Eldeſt; but a *Jew* dying, leaving iſſue divers Sons, after the Fine paid to the King, they all inherit Lands, Goods and Chattels in a kind of *Coparcenary* *. So likewiſe by the Law of the Realm if a *Jew* died ſeized of Lands, his Wife could not by the *Common Law*, bring a Writ of Dower; yet ſhe might bring a Plaint before the Juſtices aſſigned for the *Jews* in the nature of a Writ of Dower, and ſhould there recover, nevertheleſs ſubject to anſwer the King a Fine, nay though the Husband was converted to the Chriſtian Faith †.

Selden. de ſucceſſionibus apud Hebræos, c. 20.

* But that was by the eſtabliſhment of the Juſtices appointed for the Jews.

† *Cok.* 1 *Inſt. fol.* 31, 32.

Clauſ. 28. *H.* 3. *m.* 4. *dorſo. Clauſ.* 36 *H.* 3. *m.* 26. *pro quadam Judæa.*

The

The Power of Excommunication was granted the *H. 3. m. 3.*
ews to excommunicate any of their own Profeſſion;
ut the ſame could not be done by them without
Licence.

XII. Notwithſtanding all theſe Privileges and indulged Liberties which were granted to them by thoſe Kings from the Conqueror to that their fatal ear in 18 *E.* 1. yet they were in no other condition ut moſt abſolute Bond-ſlaves, and exquiſite Villains, or their Names were enrolled in the King's Excheuer for the *Jews*, and they confined to live and bide only in ſuch places as thoſe ſeveral Kings or heir Juſtices aſſigned for their Cuſtody, ſhould preſcribe and allot them, from which they might not emove without ſpecial Licence, but always be reident, that ſo the King's Officers might on all occaions find both them and their Families, and then s often as the King's pleaſure was, were they tranlated from place to place, and not ſuffered to have any habitation but where they had a common Cheſt, and where Taxes were impoſed on them, or Debts were owing from them to the Crown, their Perſons, Wives, Children, Infants, Families were impriſoned and ſent to remote places and Caſtles, nay baniſhed, execcuted, and put to Fines and Ranſoms upon all ſuch occaſions as thoſe Kings thought fit; they were ſold either Perſon by Perſon or in whole-ſale as Bondſlaves or Villains in groſs by the King, and mortgaged to thoſe who would accept them as a Pledge, or otherwiſe advance any Monies upon their Aſſignment. *36 H. 3. m. 6.*

XIII. And that they might be diſtinguiſhed from others, they were obliged always to bear a Badge and Table on their outmoſt Garments, as well Females as Males, where-ever they rode or went, to diſtinguiſh them from Chriſtians, with whom they were to have no intimate communion, nor could the Chriſtians be Servants or Nurſes to the *Jews* in any kind, their ſtate and condition being ſuch, that they were all of them meer Slaves and Servants to the King in one kind or other. *2. Clauſ 2. H 3. m. 10. dorſ.*

 When

When they had entred the Realm, they were abſolutely prohibited to depart without ſpecial Licence: the which they hardly and but ſeldom could obtain: and if they attempted it, the which they ſometimes would do to avoid the heavy Taxes that were laid on them, they were impriſoned and put to ſevere Fines and Ranſoms.

Clauſ. 15. Joh. memb. 13. Fine 7. H. 3. mem. 2. part. 1. Ebor.

XIV. As for their Real and Perſonal Eſtate, it was wholly at the diſpoſal of the King; for he might ſeize all their Lands, Houſes, Rents, Annuities, Fees, Stars, Mortgages, Debts, Goods and Chattels whatſoever, and ſell, grant, releaſe and give them to whom he pleaſed at his pleaſure.

Clauſ. 5 Hen. 3. m. 17. de dom. Judæorum.

At their deaths their whole Eſtate, both Real and Perſonal, eſcheated to the King; neither could their Heirs or Executors, Wives and Kindred have or enjoy them without making Fines, Releaſes, and Compoſitions with the King for them.

Clauſ. 7. Johan. Reg. m. 26. Clauſ. 9. Johan. Reg. m. 5, & 6.

** Clauſ. 35 H. 3. m. 5. dorſ.*

And when they had occaſion to ſue or implead any Perſon upon any account, Real or Perſonal, they could not proceed till Licence obtained, which always was upon Fines made; and thoſe very Actions after they were commenc'd he could ſtay, and the very debts which they proſecuted for, he might reſpite payment of Principal or Intereſt, and give what time he pleaſed; nay he could not only lower or leſſen the ſums mentioned in their ſeveral Charters, but he might releaſe them for ever; and though the King might pardon or releaſe a Debt, yet he might notwithſtanding revive * the ſame. And thoſe publick Cheſts, the common Repoſitory of all their Fortunes, they often ſeized and ſealed up the ſame, and diſpoſed what of them they pleaſed to the King's own uſe, notwithſtanding their Charters and Grants of Privilege, nay forced them ſometimes to tax and diſtrain one another under pain of perpetual Impriſonment, Baniſhment, Confiſcation of all their Eſtates, and the moſt ſevere Penalties that could be inflicted, they living purely under an unceſſant and arbitrary will of thoſe ſeveral Kings; and that which was the more to be admired, that if they turned Chriſtians, they immediately upon their Converſion

rſion forfeited all their Eſtates to the Crown. At ngth King *Edward* the Firſt having ſought all ways at might be to reform the exorbitant Uſuries and ꝛppreſſions which they daily committed did through e earneſt ſollicitation of the Commons publiſh an lict in Parliament for their total and univerſal niſhment, which accordingly was done, and the ing at that time ſent his Letters and Letters Pants to ſeveral Sea-Towns, reciting, That he d preſcribed a certain time for their departure t of the Realm, commanding them not to do, ꝛr ſuffer any wrong to be done them, but to ant them ſpeedy paſſage at their own coſts and arges. After which prefixed time, if they were und reſiant within the Realm, they were hang-d *, and ſome of the Rents and Profits of their louſes were diſpoſed to pious uſes, but all were enerally ſeized into the Crown, and diſpoſed nd ſold to the *Engliſh* by ſeveral Grants and Seals, nder the Great Seal of *England*. Thus theſe Peo-ꝛle having by their extraordinry Uſury, Extor-ions, and Oppreſſions reduced themſelves to be leſpiſable, and then baniſhed, and that by a Peo-ꝛle too with whom if they had continued in love nd friendſhip, and improved their Fortunes by he Rules of Moderation, they in all probability night have continued and flouriſhed, they hav-ng from the ſeveral Kings, from the Conquerour lown to their Fatal year, as many large Patents of Liberties and Franchiſes granted them, as e-ver were granted by any Chriſtian Prince or State ſince the Extirpation of their Common-wealth.

Hillar. An. 52. *H.* 3. *Rot.* 9. in the Exchequer.

Cok. 2. *Inſtit. fol.* 507.

* *Matth Weſtm. Flor. Hiſt. An.* 1290. *part.* 2. *fol.* 381.

In the 20 year of *Ed.* 1 there endorſed *Charta de Judaiſmo Litera Patentes de domibus Judæorum conceſſis poſt eorum exilium de Anglia*, above an hundred particular Patents of the Sale of their Houſes.

But notwithſtanding this, yet Commerce and Traffick having now taught them a more exquiſite way of enriching themſelves, than by that cruel and biting Trade of Uſury, they have now got footing into the Realm, and do now flouriſh in as high a manner as of old, (though it is hoped not in that manner for which they juſtly procured their total baniſhment out of the ſame) and ſince time hath been ſo kind to them as to deſtroy theſe

Rolls and Monuments of their former Crueltie and Oppreſſions, and where their Baniſhment wa recorded (there being no other footſteps of the ſame, nor of any other before 5 *Ed.* 2. to be found they being totally loſt; yet there are other Records that have ſufficient Recitals of the ſame as well as Hiſtory to evince the truth, if in the leaſt contradicted) it is hoped that if they continue in the Realm, that they will by their conſtant actions conſult and do ſuch things as may ſtand with the Honour, Juſtice, and Good of the Kingdom.

CHAP

CHAP. VII.

Of Merchants.

I. *Merchandizing, the ſame is honourable and profitable both to Prince and State.*
II. *The advantages that might accrue to Kingdoms, if the more Noble and richer ſort applied themſelves to the ſame.*
III. *Of the firſt Inſtitution of the Company of Adventurers.*
IV. *Of the Inſtitution of that in* England *to the* Indies.
V. *Of the forming of that in* Holland, *to thoſe parts.*
VI. *Of the forming the like by the moſt Christian King to the ſame parts.*
VII. *Of the Advantages and Diſadvantages conſidered, in reference to reducing them to Companies.*
VIII. *How Merchants in* England *were provided for of old.*
IX. *Of their Immunities ſetled by* Magna Charta.
X. *Of Merchant Strangers, whoſe Prince is in VVar with the Crown of* England, *how to be uſed in time of VVar, and the reaſons why Merchant-Strangers ought to be uſed fairly.*
XI. *Goods brought in by them, the Monies raiſed how to be diſpoſed according to the Statute of Imployment.*
XII. *Merchant-Strangers, made Denizens by Parliament, or Letters Patents, to pay as before they were ſo made.*
XIII. *VVhat things requiſite that make a competent Merchant according to Law.*
XIV. *One Merchant may have an Account againſt his Partner, and if he dies, no Survivorſhip to be of the Eſtate belonging, or accquired in their Traffick.*
XV. *Of the Immunities which they claim by the Cuſtom of Merchants, in reference to Exchange.*
XVI. *All Subjects are reſtrained to depart the Realm but Merchants.*
XVII. *Prohibitory Laws bind Foreigners according to the Leagues of Nations.*
XVIII. *The neceſſity and advantage that is incumbent on Merchants to preſerve their Marks.*

I. THere are certain Affairs which ſhould be left to the poor and common People to enrich them, but there are others which they only can execute which are rich; as that at Sea by way of *Merchandizing*, which is the moſt profitable in an Eſtate, and to the which they ſhould attribute more honour, than ſome do here at this day. For if in all

Eſtates they have thought it fitting to invite the Subjects by honour to the moſt painful and dangerous actions, the which might be profitable to the publick, this being of that quality, that they ſhould attribute more honours to thoſe that deal in it: And if *Nobility* hath taken its foundation from the courage of Men, and from their valour, there is certainly no Vocation in the which there is ſo much required as in this; they are not only to encounter and ſtrive amongſt Men, but ſometimes againſt the four Elements together, which is the ſtrongeſt proof that can be of the reſolution of Man. This hath been the occaſion that ſome have been of Opinion, that they ſhould open this door to Merchants to attain to *Nobility*, ſo as the Father and Son have continued in the ſame Trade, and to ſuffer Noble-men, who are commonly the richeſt in Eſtates, to practiſe themſelves (without prejudice to their condition) in this of Commerce; the which would be more honourable unto them than to be Uſurers and Bankers, as in *Italy*; or to impoveriſh themſelves in doing nothing but ſpend, and make conſumption of their Fortunes, and never gathering or laying up.

Præter mercaturæ uſum Naves rei militari, & tutandæ in mari contra externam vim reipub inſervire cæperunt, Ariſtot. 7. Polit. 6. Mare & claſſem in bello eſſe tutelam reipub. *ait Tacitus 5. Hiſt. Claſſ.* Imperii munimenta *vocant Atheniensium legati apud Thucydidem lib. 1. H. Orat. ad Lacædamon. fortunas Greciæ in navinum præſidio ſitas fuiſſe prædicant, ejus rei muri lignei* Themiſtoclis [illegible] *fidem fecerunt, idem experientia ſatis hodie loquitur, Inde* Coſmo Medicæo *Familiare fuit dictum,* Non habendum potentem qui potentiæ terreſtri, non ſimul cum navalem haberet conjunctam. *Et Hiſpanorum eſt adagium,* Regnum ſine porta eſſe ſicut furnum abſque igne: *Præterquam quid navigationes cultui vitæ, & artium traductioni Coloniarium valetudine, & voluptati ſerviunt.*

The moſt uſual way of Buying and Selling of Commodities, between Merchants beyond Seas, is by Bills of Debt, or Obligatory, call'd Bills Obligatory, which are there by the Law Merchant Alienable or Aſſignable, tho' not by our Law, as being held as *choſes en Action* where no property can paſs by Aſſignment or Alienation, tho' certainly it would be of great convenience, were they by Act of Parliament made Aſſignable, as by Cuſtom, their Bills of Exchange are by Endorſment. *Lex mercat.* 71.

The Form of ſuch a Bill Obligatory.

I. A

I, *A. B.* Merchant of *Amſterdam*, do acknowledge by theſe preſents to be truly Endebted to the Honeſt *C. D. Engliſh* Merchant Dwelling at *Middleborough*, in the Sum of 500 *l.* currant Money for Merchandize, which is for Commodities received of Him to my Contentment; which Sum of 500 *l.* as aforeſaid, I do promiſe to pay unto the ſaid *C. D.* (or the Bringer hereof) within Six Months next after the Date of theſe Preſents. In Witneſs whereof, I have Subſcribed the ſame at *Amſterdam*, the 10*th* of *July*, 1704. *Stilo novo.* Sometimes, and in ſome Countries this Bill is Sealed, *Lex Mercat.* 74. Laws of the Sea, 585. And if ſuch Bill be made beyond Seas, by 2, 3 or more Perſons, as having bought a Commodity as Partners together, or taking up Monies together at Intereſt; wherein they Bind themſelves all as Principal Parties or Debtors, yet every one is Bound to pay but his own Part, by the *Civil Law*, and Cuſtom of Merchants, *Lex Mercat.* 75.

Surety, tho' not intended

Merchants ought to be very wary and circumſpect in their giving a Character one of another, as to their Credit in their Dealings as to each others Ability, leſt unawares they become Sureties, where not ſo much as intended. To which end I ſhall cite a Caſe in *Lex Mercat. cap.* 10. *fol.* 69, which was this. A Merchant being at *Franckfort* in *Germany*, during the Mart-Fair there, went into a Merchants Warehouſe to confer of ſome buſineſs with him; where he found another Merchant of his Acquaintance cheapening a Parcel of Silk Wares of the ſaid other Merchant, to whom this Man (as it ſeem'd) was unknown, whereupon the Seller of the ſaid Silk-Wares, took occaſion to ask of him, whether he were a good Man, and of Credit, who anſwered he was. So the Bargain was made, and the Goods delivered to the ſaid Merchant, the Buyer, to the value of 460 *l.* For the which he made a Bill Obligatory, Payable the next Fair following, at which time the Buyer not appearing, Demand was made of the Merchant that gave the Buyer the Character of being a good Man and of Credit,

who in his Defence did alledge that what he ſaid was but only a bare Character, and at moſt was but *Nudum Pactum ex quo non Oritur Actio.* And ſo not bound to pay the ſame, as having had no conſideration for it. And upon Suit thereupon he was adjudged to pay the ſaid 460 *l.* and all he had for a Recompence to reimburſe himſelf, was the Buyer's Bill Obligatory made over to him, which proved of no avail, for that the Buyer became inſolvent. Note, this was by the *Civil Law* and general Law and Cuſtom between Merchants. Tho' I conceive this would not in any wiſe avail in our Law, but thought fit to add this Caſe (being from ſo good an Author) as a Caution to Merchants, how they give a Character of other Merchants, whereby they gain Credit to be truſted.

Action of Debt was brought by a *Concesſit ſolvere,* according to the Law Merchant and the Cuſtom of the City of *Briſtol. Godbolt.* 49.

Two Partners one makes a Factor.

If two Men be Partners of Merchandize in one Ship, and one of them appoints and makes a Factor of all the Merchandizes, both of them may have Writ of Account againſt him, or they may joyn in one Writ, *Tamen quare, Godbolt* 90. *Faſhion cont. Atwood.*

Account by one joint Factor for the other.

One joynt Factor may account without his Companion by the Law of Merchants, for Factors are oftentimes diſperſed, ſo as they cannot be both preſent at their Accounts, *Goore & als cont. Davbeny* 2. *Leon.* 75. 76.

Sale by a Factor, to one that becomes Bankrupt.

A Merchant delivered *Kerſies* to be ſold in *Spain,* the Factor ſells them to one who becomes a Bankrupt (and there is a Law in *Spain,* that if the Factor enter this before a Regiſter, and had a Teſtimonial that he ſhall be Diſcharged) we judge here that he ſhall be diſcharged. In *Capps.* and *Tucken* caſe 2 *Rolls. Repts.* 497.

Account againſt him.

Account for Goods receiv'd *ad Mercandizandum* is good by Ch. Juſt. *Hales.* And tho' declared againſt as Receptor general; yet ſhall not anſwer other profits, and ſhall have charges as a Bayliff. *Bardet cont. Threele.* 3. *Keeble* 387.

Factor buys generally.

If a Servant or Factor Buy Goods generally, and

. doth not upon the Contract declare that he y Buyeth as Servant or Factor, he is charge-e in his own right *Degelder* againſt *Savory*. 2 *Keeble* 2.

In Account 'twas held *per Curiam*, that if a Man de-ers Money to his Bayliff or Factor to lay out for n in Commodities, he cannot bring an *Aſſumpſit*, t only an Account, for it may ſo happen, that the ctor hath laid out more Money than he hath re-ived, 1 *vent.* 113. *Anonymous.* Where Account, not *Aſſumpſit* lyes againſt a Factor.

Indebitatus Aſſumpſit for 1000 *l.* for Monies had d receiv'd, and alſo an *Inſimul computaſſet*, upon ccount; the 1000 *l.* became due; the Defendant leaded the Stat. of Limitations. The Plaintiff replied hat he is a Merchant, and the Proviſo and excep-ion for Merchants Accounts. By *Twisden, Rainsford* & *Moreton abſente Keeling*, Stated Accounts between Merchants as this Caſe is, are not within the Pro-viſo, but only Accounts Currant, *Webber cont. Tyrell.* 1 *Levins* 287. 2 *Keeble* 622. 2 *Sand.* 124. Where Judg-ment for the Defendant. Yet the Caſe of *Martin* and *Delboe*, 1 *Levins* 298. to the contrary upon an Account Stated between Merchants; yet the ſame Caſe, 1 *Mod.* 70. Judgment for Defendant, 2 *Keeble* 674. 1 *Vent.* 89. & 1 *Sid.* 465. See likewiſe the Caſe of *Farrington* & *Lee.* 1 *Mod.* 268. & 2 *Mod.* 311. Merchants Account *Stat. of Limit.* pleadable.

II. Hence will grow many advantages both to the publick and private: To the publick, for that they that ſhould deal in Commerce, having Means, Courage, and Sufficiency for this Conduct, it would be far greater in the furniſhing more Ships to Sea, and bet-ter armed, the which the State at need might make uſe of for the ſafety of the Publick, and would add to the reputation of the Nation in all parts, they knowing that an Indignity or Damage offered to ſuch, would require ſatisfaction with a ſtrong and powerful Hand; the which they cannot do, who being poor, and having but ſmall ſtocks, or what they borrow from Bankers, or are indebted for the Cargo which they ſend forth, have not the Cour-age to hazard themſelves and their All in an Enter-prize that is great. Beſides, ſuch who have honour,

riches,

riches, and courage, would keep up the reputa[tion] of their ſeveral Commodities, by not leſſening the Ma[r]ket, whereas the *poorer ſort, (to pay Cuſtoms, Frai[ght] Bills of Exchange, and other contingent and neceſſary c[har]ges,* which accompany the importing and exporti[ng] are often forced to ſell for an inconſiderable gain; [na]y ſome rather than their Wants ſhould be known, [w]ill for ready Money ſell their Goods for even leſs t[han] they coſt: All which would be prevented, if [the] Perſons of value would apply themſelves to a pr[u]dent management of the ſame; for whatſoever [ha]zard they run, there would be more gotten by [them] in two, than by the poorer ſort in three or f[our] Voyages, and by that means it would be the occaſi[on] of avoiding many expences, and prevent the impo[r]tuning their Prince for Places, when perhaps the[y] might get more at Sea in one year, than in ten a[t] Court. Beſides, experience hath taught, and doe[s] daily manifeſt, that where the moſt Subſtantial hav[e] dealt in Commerce, it hath enriched both them and the State under which they lived; and this preſen[t] practice of the *Venetians, Portugals, Spaniards* an[d] *Hollanders* plainly demonſtrates.

Arbitrament, made a Rule of Court.

Stat. 9, 10 *W.* 3. C. 15. Of ending Suits by Arbitrament. After the 11*th* of *May* 1698. All Merchants and Traders and others deſiring to end any Controverſie, Suit or Quarrel, for which there is no other Remedy but by perſonal Action or Suit in Equity, by Arbitrament, may agree, that their Submiſſion of the Suit to the Award or Umpirage of any Perſon or Perſons ſhould be made a Rule of any of his Majeſties Courts of Record, which the Parties ſhall chuſe, and may inſert ſuch their Agreement in their Submiſſion, or the condition of the Bond or Promiſe; and upon producing an Affidavit of ſuch Inſerting, and upon Reading and Filing ſuch Affidavit in the Court ſo choſe, the ſame may be entred of Record, that the Parties ſhall ſubmit to, and finally be concluded by ſuch Arbitration or Umpirage. And in Caſe of Diſobedience thereto, the Party neglecting or refuſing, ſhall be Subject to all the Penalties of contemning a Rule of

Court,

ırt, and Proceſs ſhall Iſſue accordingly, which
ıl not be ſtopt or delayed, unleſs it appear on
th that the Arbitrators or Umpire misbehaved
mſelves, and that ſuch Award was corruptly or
luly procured. In which Caſe ſuch Arbitration or
ıpirage ſhall be void and ſet aſide by any Court of
w or Equity, ſo as ſuch corruption or undue Pra-
:e be complained of, in the Court where the Rule is
de for ſuch Arbitration, before the laſt day of the
xt Term, after ſuch Arbitration made and Publi-
ed to the Parties.

Which Clauſe may be to the purpoſe following, at
e end of the Condition, *viz.* And the above-menti-
ed *A. B.* doth agree and deſire that this his Sub-
iſſion to the Award above-mentioned be made a
ule of His Majeſties Court of King's Bench, pur-
ıant to the late Act of Parliament, for this purpoſe
rovided.

The like for the other Party ſubmitting to ſuch
ward.

A Submiſſion was to an Award by Bond, and at the End of the Condition of the Bond was this Clauſe: *And if the Obliger ſhall conſent that this Submiſſion ſhall be made a Rule of Court, that then,* &c. Upon Motion to make this Submiſſion a Rule of Court, it was oppoſed, becauſe theſe words do not imply his Conſent; but if he would forfeit his Bond, he need not let it be made a Rule of Court; yet becauſe this Clauſe could be inſerted for no other purpoſe, the Court took theſe conditional Words to be a ſufficient Indication of Conſent, and made the Award a Rule of Court. Salk. 72. pl. 8

A Matter was referred by Conſent at *Niſi prius* to the three Foremen of the Jury; and before the Award was made, one of the Parties ſerved the Arbitrators with a *Subpœna* out of Chancery, which hindred their proceeding to make the Award. And the Court held this a Breach of the Rule, and granted an Attachment, *Niſi Cauſa.* Salk. 73. pl. 10. Farreſley 8.

Upon a Submiſſion to the Award of the three Foremen of the Juy, who made their Award, the Defendant moved to ſet it aſide; becauſe they went on without giving him Time to be heard, or produce Salk. 73. pl. 11

a Wit-

a Witneſs: And *Holt* Chief Juſtice ſaid, the Arbi-tors being Judges of the Parties own chuſing, the Par-ty ſhall not come and ſay they have not done Juſtice, and put the Court to examine it: Al- where they exceed their Authority: however Award was examined and confirmed, and the Plain-tiff moved for an Attachment for not performing; and the Court held, that the Non-performance w the Mater was *Sub Judice*, was no Contempt: then Plaintiff moved for his Coſts, and that was denied upon which *Powel* Juſtice ſaid, that ſeeing they co not give the Party any Coſts, he ſhould never be examining into Awards again.

Salk. 73. *pl.* 12. *H.* Bound himſelf in a Bond to ſtand to the Aw of *J. S.* which Submiſſion was made a Rule of Cou The Party for whoſe Benefit the Award was mad moved the Court for an Attachment for *Non-perfor-ance*, which was granted: pending that he broug an Action of Debt upon the Bond; upon this Serjea *Darnell* moved that he might not proceed both way and likened it to the Caſes, where the Court ſta Actions on Attorneys Bills, while the Matter is un-der Reference before the Maſter. *Sed per Curia* the Motion was denied, and this Difference take where the Court relieves the Party by way of amends in a ſummary way, as in the Caſe cited, there it is reaſonable; otherwiſe here, where the Plaintiff has no Satisfaction upon the Attachment, and the Defen-dant was put to anſwer Interrogatories.

Salk. 87. *pl.* 1. Attachment lies not for not performing an Awar made upon a Rule of Court without a Perſonal De-mand. *Holt* Chief Juſtice remembred the firſt At-tachment of this kind was in Sir *John Humble's* Caſe in *Kelyng's* Time, in which, and ever ſince, a Perſonal Demand has been thought neceſſary. In ſuch Caſes of Awards, tho' they be not legally good, an Attach-ment lies for Non-performance, *aliter* if impoſſible; but the Party is excuſed as to that part which is im-poſſible only.

Salk. 84. *pl.* 3. If a Rule be made at *Niſi prius* to refer a Matter to the three Foremen of the Jury, and that the Plain-tiff may either enter upon Judgment on the Verdict, or

have an Attachment for not obeying the Rule of ourt, it being in his Election which way he will ecute the Award; and this was affirmed by Mr. *ortbey* and at the Barr to be the conſtant practice. *ourton* and *Gould* (in the Abſence of the Chief Juice) doubted of it, becauſe the Verdict ſtood ſtill n Record; to which Mr. *Northey* anſwered, there ould not be a Judgment entred on ſuch Verdict withut Leave of the Court: And the Attachment was ranted.

III. The conſideration of which firſt gave light o that induſtrious Nation the *Burgundians*, to procure the Aſſociation or Incorporation by *John* Duke of *Brabant*, of that ancient Company of the Adventurers, *Anno* 1248. which were then called the Brotherhood of St. *Thomas Becket* of *Canterbury*; which being afterwards tranſlated into *England*, was by *Edward* the Third confirmed, and by his Succeſſors *Henry* the Fourth, *Henry* the Fifth, *Edward* the Fourth, *Henry* the Sixth, *Richard* the Third, and King *Henry* the Seventh, who gave them the name of Merchant-Adventurers, and from him ſucceſſively hath their Charter been confirmed down to, and by his Sacred Majeſty that now is; and as this Society is of ancient eſtimation, ſo is their Government very commendable.

IV. The Society of the Company, trading to the *Eaſt Indies*, differs from others, both as in reference to the Perſons and Members, which are at this day many of the principal Nobility of *Engand*, as alſo for that their Adventurers run all into many Stocks, and is governed and carried on jointly upon benefit and loſs; they were incorporate *Anno* 1599. and ſince they ſurrendred their Charter, and accepted a new one, and are incorporated by the name of *Governour*, and *Company trading to the Eaſt-Indies*; their Adventurers run all into one *general Stock*, and is governed and carried on upon benefit and loſs; the ſame being at this day, according to the Subſcriptions, about four hundred thouſand pounds, which the ſeveral Perſons Subſcribers may ſell, transfer, and diſpoſe of; but they can no ways take out the ſame:

ſame: The *Great Stock* may be increaſed, if the Company ſhall ſee occaſion to permit it; but they are very cautious of the ſame, for that the greater the Dividends, the more Reputation the Stock bears, which above all things is to be maintained; however directly upon his own account, no Perſon can have above ten thouſand Pound Stock there, nor can he have a compleat Title, till he is made a Free-man of that Society; their Returns are very profitable, and of late very rich, and have many places of great importance in *India*, as *Meſlopotam* on the Coaſt of *Cormandel*, *Bombay*, *Surat*, Fort of St. *George*, *Bantam*, &c.

V. The *Dutch* having found relief in their diſtreſs from the *Britiſh* ſhore, againſt their powerful Enemy, found alſo a pattern to carry on Commerce; they not being wanting in the imitating the Incorporation of a Company, trading to thoſe Places which they poſſeſſed in the *Eaſt-Indies*; and therefore in the year 1602. leave was granted from the *States* to Traffick into thoſe Parts before all others, during the ſpace of one and twenty years, the which was granted them, in conſideration of five and twenty thouſand Floriñs, which they promiſed to pay to the *States* during the firſt ten years. Thus reduced all into one Company, *Amſterdam* had one moiety, *Middleburgh* in *Zealand* a fourth part, *Delph*, *Rotterdam*, *Horne*, and *Enchuſen* had each of them a ſixth part, the whole Stock of this Union amounting to ſix Millions of Livres, or ſix hundred thouſand pound Sterling.

For the direction of this Trade, and the Intereſts of the Aſſociates, they have eſtabliſhed in either of thoſe Towns, a certain number of Adminiſtrators, at *Amſterdam* twenty, at *Middleburgh* twelve, in either of the reſt ſeven; and if any one dies, the Chamber of the Place names three, of which either the *States-General*, or the Magiſtrate of the Town chuſeth one.

Thoſe

Thoſe Chambers chuſe ſeventeen among the Adminiſtrators, that is to ſay, *Amſterdam* eight, *Middleburgh* four, *Delph* and *Rotterdam* two, *Horne* and *Enchuſen* two; and the Seventeen are choſen alternatively, ſometimes at *Middleburgh*, ſometimes at *North-Holland*; the which are called together to reſolve jointly of how many Ships, and of what Equipage and Furniture they ſhall make the Fleet, which they mean to ſend, and to what Fort or Coaſt they ſhould go. This Aſſembly is held ſix Years together at *Amſterdam*, and afterwards two Years at *Middleburgh*, and then again at *Amſterdam*; by the Conditions of the Accord the Ships muſt return to the ſame Port from which they parted; and the Spices which are left at *Middleburgh*, and other Chambers are diſtributed amongſt them by the weight of *Amſterdam*, and the Chamber which hath ſold her Spices, may buy from other Chambers.

By this Order * they have hitherto continued this Commerce with reputation, not as ſimple Merchants only, but as if they were Sovereigns, they have made in the Names of the *States*, Alliances with many of the Princes of thoſe parts; as with the Kings of *Siam*, *Quadoen*, *Patam Johor*, the Heir of *Mataca*, *Bornean*, *Achin*, *Sumatra*, *Baretan*, *Jocotra*, and other King's of *Jatta*; they have made themſelves abſolute Maſters of the Iſland of *Amboyna*, but by what means? —— Where they have a Preſident who governs in their name; at *Banda* they have Fort for a retreat, where they muſt deliver the Spices at a certain Price; in *Triniate* they have another a Mile diſtant from that of the *Portugals*; at *Magniene* they have three; at *Motire* one; at *Gilolo* they have taken that which the *Portugals* have built; and indeed whatſoever either can, or may conſiſt with their Intereſt in thoſe parts, they have ingroſſed, and by that means almoſt the Trade of the whole Spices of the *Eaſt*.

* There are now ſome variations.

VI. So likewiſe the moſt Chriſtian King hath within few years eſtabliſhed ſuch another Trading to thoſe *Eaſtern* Parts.

And in *England* we have ſeveral others, as that of trading to *Turkey*, that of *Africa* to *Guiney*, and ſeve-

ral

ral others, dividing the ſeveral Trades according to Coaſts and Places where they are appointed, forbidding them to intrench or incroach on each other; ſo like-wiſe to all other his Majeſties Subjects on ſevere Penalties.

VII. Now it is not the dividing of the Trade to Companies that can anſwer the expectation; it is the dividing the Trade into Companies, where the places may bear it; as that to the *Indies*, *Turkey*, *Hamborough*, and ſome others: But to ſome, as the *Canaries*, *France*, or any of thoſe places on this ſide the Line, it has been conceived the Trade will not anſwer it, but the ſame would be better diſtributed either into the Trade of voluntary Aſſociations, or ſingle Traders; others perhaps would reſult into Monopolies, if incorporated; however the Standard Rule is to know whether the Trade of the Place will bear a Company, or not.

It is Foreign Trade that is the main Sheet Anchor of us Iſlanders, without which the Genius of all our uſeful Studies, and the which renders Men famous and renowned, would make them uſeleſs and inſignificant to the Publick. When Man has fathomed the bottom of all Knowledge, what is it, if not reduced to Practice, other than empty notion? If the Inhabitants of this Iſland were learned in all the Languages between the riſing and ſetting of the Sun, did know and underſtand the ſituation of all Places, Ports, and Countries, and the nature of all Merchandize and Commodities, were acquainted with the Order and Motion of all the Stars, knew how to take the Latitude and Longitude, and were perfectly read in the Art of Navigation, to what purpoſe would all be, if there were no Foreign Trade? We ſhould have no Ships to navigate to thoſe Countries, nor occaſion to make uſe of thoſe Languages, nor to make uſe of thoſe Commodities. What would this Iſland be without Foreign Trade but a place of Confinement to the Inhabitants, who (without it) could be but a kind of Hermites, as being ſeparated from the reſt of the World; it's Foreign Trade that renders us rich, honourable and grea[t]

, that gives us a Name and Eſteem in the
d that makes us Maſters of the Treaſures of
Nations and Countries, and begets and main-
our Ships and Seamen, the Walls and Bulwarks
ır Country; and were it not for Foreign Trade,
would become of the Revenue (as one hath inge-
ly obſerved) from ſix to eight hundred thouſand
ds for Cuſtoms, and would the Rents of our
ls be? The Cuſtoms what would totally fail, and our
lemens Rents of thouſands *per annum*, would dwin-
nto hundreds. *Les advantages de Commerce a la East-India.*

III. Merchants in *England* were always favoura-
provided for by the *Common Law* of this King-
. By the ancient Laws of King *Alfred* it was
vided, Defendue fuit que nul Merchant-Alien
jantaſt Angleterre, forſque aur quarter Faires,
que nul demeuraſt in la terre outer quarante
rs: *Mercacatorum navigia, vel inimicorum quidem
unque ex alto (nullis jactata tempeſtatibus) in portum
uem invebentur tranquilla pace fruantur, quinetiam ſi ma-
cta fluctibus, ad domicilium aliquod illuſtre, ac pacis be-
cio donatum navis appulerit inimica, atque iſtuc nauta
fugerunt, ipſi & res illorum omnes auguſta pace potiuntur.* *Miroir, cap. 1. Sect. 3. Intr. leges Ethel. cap. 2.*

IX. Again, by the Grand Charter of our Liber-
s, they are provided for in theſe words: *Omnes
ercatores niſi publice antea probibiti fuerint, babeant ſal-
n & ſecurum conductum, (exire de Anglia, & venire in
igliam, & morari, & ire per Angliam tam per terram,
im per aquam, ad emendum vel vendendum ſine omnibus
lis tolnetis per antiquas & rectas conſuetudines præterquam
tempore guerræ. Et ſi ſint de terra contra nos guerrina &
es in veniantur in terra noſtra in principio guerræ, attachi-
tur ſine damno corporum ſuorum, vel rerum, donec ſciatur
nobis, vel a Capitali Juſticiario noſtro, quomodo Mercato-
s terræ noſtræ tractantur, qui nunc inveniuntur in terra
a contra nos guerrina; & ſi noſtri ſalvi ſint, ibi alii ſalvi
nt in terra noſtra.* *Magna Charta, cap. 30.*

1. By which it is declared, that all Merchant-
trangers might be publickly prohibited to Trade
nto this Realm, be they in Amity, or otherwiſe.

2. All Merchant-Strangers in Amity, except ſuch
s be ſo publickly prohibited, ſhall have ſafe and
ure conduct in ſeven things.

Addit Canon, Mercatores, quod non tantum de his qui temporarium in hoſtico moram agitant, intelligendum eſt, ſed ut de ſubditis perpetuis; nam & horum vita ab armis aliena: Eſt ac ſub hoc nomine continentur ſimul alii opifices & artifices quorum quæſtus pacem amat, non bellum. Grotius de Jure belli lib. 3. cap. 11. §.

1. To depart out of
2. To come into
3. To tarry in
4. By Water and Land to go in, and through
} England.
5. To buy and ſell.
6. Without any manner of evil Tolls.
7. By old and rightful Cuſtoms.

X. But concerning ſuch Merchant-Stangers, whoſe Prince is in War with the Crown of *England*, if they are found within the Realm, at the beginning of the War, they ſhall be attached with a Privilege and Limitation, *i e.* without harm of Body or Goods; with this limitation, until it be known to the King, or his Chief Juſtice *, how Merchants of *England* are uſed and intreated in their Country, and accordingly they ſhall be uſed in *England*, the ſame being *Jus Belli.* But for Merchant-Strangers that come into the Realm after War begun, they may be dealt withal as open Enemies; it being the Policy of *England* ever to entertain Merchant-Strangers fairly. In the 18th year of *Ed.* I. in the Parliament Roll it is contained thus: *Cives London petunt quod alienigeni Mercatores expellantur a Civitate, quia dicantur ad depauperationem Civium, &c.—Reſponſio—Rex intendit quod Mercatores extranei ſunt idonei & utiles magnatibus, &c. & non habet Concilium eos expellendi.*

* That is, the Keeper of the Realm in his abſence.

Et in Republica maxime conſervanda ſunt jura Belli. Co. 2. Inſtit. fol. 58.

Rot. Parliam. 18 E. 1. fol. 4. num 55.

However, though great Immunities were granted them, yet they always found Sureties that they ſhould not carry out the Merchandize which they brought in.

Rot. Vaſcon. 18 Ed. 2. m. 21.

XI. And at this day, if they bring in any Merchandize into the Realm, and ſell the ſame for Monies, they are to beſtow the ſame upon other Merchandizes of *England*, without carrying of any Gold or Silver in Coyn, Plate or Maſs out, on forfeiture; the principal reaſon of this was as well to preſerve and keep the Gold and Silver within the Realm, as for the increaſe of the Manufactures; and the ſame at

4 H. 4. cap. 5. 5 H. 4. cap. 9.

this day extends as well to Denizens, ſo made by tters Patents, as Strangers; however he may uſe the ne in payment to the King's Liege People, without ncurring the Penalty of the Statute of 4 *H.* 4. but † in ſtrictneſs of Law, ought not to receive * any ld in payment.

† *Stat.* 17. *E.* 4.c.1. confirmed. by 3 *H.* 7. c. 8.

XII. All Merchant-Strangers that ſhall be made Deɛens, either by the King's Letters Patents, or by Act Parliament, muſt pay for their Merchandize like ıſtom and Subſidy, as they ought, or ſhould pay beɛe they were made Denizens.

* 8 *H.* 6.c.14. 11 *H.*7 cap.14. 22 *H*,8. cap. 8. 1 *Eliz.* cap. 1. Co. 2. *Inſt. fol.* 742.

XIII. Every one that buys and ſells, is not from ence to be denominated a *Merchant*, but only he 1ɔ trafficks in the way of Commerce, by Importion or Exportation; or otherwiſe in the way of nption, Vendition, Barter, Permutation, or Exange, and which makes it his living to buy and ll, and that by a continued aſſiduity, or frequent egotiation in the Myſtery of *Merchandizing*: But ıoſe that buy Goods to reduce them by their own rt or Induſtry into other Forms than formerly they ere of, are properly called Artificers, not Merchantt: ſot but Merchants may, and do alter Commodities afɛr they have bought them for the more expedite Sale of hem, but that renders them not Artificers, but the ſame ; part of the Myſtery of Merchants; but Perſons buyıg Commodities, though they alter not the Form, yet if ıey are ſuch as ſell the ſame at future days of payment or greater price than they coſt them, they are not proɛerly called *Merchants*, but are *Uſurers*, though they ıbtain ſeveral other names, as *Ware-houſe-Keepers*, and he like; but Bankers and ſuch as deal by Exchange, ıre properly called *Merchants*.

Leg. anic. Cod. de nund. & Alceat. in Leg. mercis 66. & *in Leg. mercis* 207. *de verb. ſignif.*

C. ejiciens 88. *diſt.*

Paul de Caſtr. in Leg. eum ff. de Inſt.

XIV. The Wares, Merchandizes, Debts or Duties that Merchants have as joynt Traders, or Partners, ſhall not go to the Survivor, but ſhall go to the Exɛcutor of him that is deceaſed (*a*) And the Executor may oyn in an Action with the ſurviving Merchant, 2 *Le*ɜins 188. *Hall* againſt *Huſſam.*

38 *E.* 3. 7. Co. on *Littlet. fol.* 182. per *Legem mercatoriam jus, accreſcendi inter Mercatores per beneficium commercii locum non habet*

(a) *Sed Quære*, for it hath been ſince held, that the Executor and Surviver cannot joyn, for the Remedy Survivers, tho' the Duty doth not; and therefore on Recovery he muſt be accountable to the Executor for that. *Martin v. Crump*, Salk. 444 ɩ *Keb.* 798.

If two joint-Merchants occupy their Stock, Goods, and Merchandize in common to their common profit, one of them naming himſelf a Merchant, ſhall have an account againſt the other naming him a Merchant; and ſhall charge him as *Receptor* * *denariorum ipſius B. ex quacunque cauſa & contractu, ad communem utilitatem ipſorum A. & B. provenient ſicut per Legem Mercatoriam rationabiliter monſtrare poterit*, 10, *H.* 7. 16. *a.*

* Co ſup. Litt. fol. 172. lib. Intrat. fol. 17. 18. 19. F. N.B. 117. D.

Lex Oleron. Partners of a Ship diſagr.

If there be ſeveral Owners of a Ship, and they fall out, the Ship notwithſtanding this Variance may make one Voyage upon their Common Charge and Adventure, before ſuch time as they ſhall be ſo much as heard to diſſolve the Partnerſhip; but if after that they cannot agree, he who deſires to be Free, is to offer to the reſt his Part at a Price, as he will either give or take; which if he will not do, and yet refuſes to ſell the Ship, forthwith the reſt of the Owners or Partners then may Rig the Ship at their own Charge, and upon the Adventure of the Refuſer, ſo far as his Part doth extend, without any Account to be made unto him of any Part of the profit at her Return. But they are bound to bring her Home ſafe, or to anſwer him the value of his Part: But if the Perſons Partners who have the greateſt Share or Part of the Ship refuſe to continue the Partnerſhip, with one who hath but one Part or a ſmall Share in the Ship, who cannot ſell or part with his Part at a Price ſet, without great Loſs, nor is of Ability to Buy their Parts, then are they all Bound to put the Ship to an Appraiſment; and ſo diſpoſe of her by Sale, or ſetting her forth on the Voyage according to ſuch Appraiſment. And if for want of Buyers, the poor Partner can neither avoid the Oppreſſion of the Richer, nor yet the Rich ſatisfie the poor Man, who alſo may be obſtinate and wilful, then may the Judge of the *Admiralty*, Sentence or decree the ſame, as he may do in *Omnibus aliis bonæ fidei Actionibus. Lex Mercat.* 120, 121.

Action againſt one when two promiſed.

In an Action upon the Caſe againſt *A.* the Plantiff declares upon the Cuſtom between Merchants, &c. That if two Merchants are found in arrear upon an Account, and they promiſe to pay it at certain Days, that any or either of them may be charged for the whole ſingly; and then ſhewed the account that *A.*

and

and *B.* were found in Arrear ſo much, &c. And promiſed to pay it at certain Days, but did not, and the Plantiff brought his Action againſt *A.* only, and reſolved that it lay. *Child* againſt *Guyot*, 2 *Rolls Abr.* 702. 703.

If two Merchants have a joint Trade, and one of them accept a Bill of Exchange, if he do not pay it, an Action lyes againſt the other, *per Twiſden*, Stiles 370. but rather againſt both. *Salk.* 126.

XV. And, as the Law eſtabliſhes ſecurity for their Eſtates, ſo it gives them other Immunities in their Commerce; for if one Merchant draws a Bill of Exchange upon another, be it in-Land or out-Land, (if it be by way of Exchange) the acceptance of the Bill by the Party ſhall bind him to that Party, to whoſe uſe the Money in the Bill is to be paid, and he may bring his Action in his own name, *per Legem mercatoriam.* *Martin verſus Bouz.* 1 *Jac. B. R.* 2. *Cro. fol.* 7.

And ſo it is, if a third Perſon, that is a Stranger to the Bill, ſhall accept the ſame *for the honour of the Drawer*, it ſhall bind him as effectually, as if he upon whom the Bill was drawn had accepted it; and this by the Cuſtom of Merchants. *Vide tit. Exchange. Lutw.* 891. b

Merchandize is ſo Univerſal and Extenſive, that it is in a manner impoſſible, that the Municipal Laws of any one Realm ſhould be ſufficient for the ordering of Affairs and Traffick relating to Merchants. The Law concerning Merchants, is called the Law Merchant from its univerſal Concern, whereof all Nations do take ſpecial Knowledge, and the Common and Statute Laws of *England*, takes notice of the Law Merchant, and leave the Cauſes of Merchants in many Inſtances to their own peculiar Law. As in the 13 *Ed.* 4. 9, 10. A Merchant-Stranger made Suit before the King's Privy Council, for certain Bails of Silk feloniouſly taken from him, wherein it was moved that this matter ſhould be determined at Common Law; but the Lord Chancellor anſwered, that this Suit is brought by a Merchant, who is not bound to ſue according to the Law of the Land, nor to tarry the Tryal of 12 Men. And it was there likewiſe reſolved

by all the Juſtices, that if the Merchandizes of ſuch a Merchant Stranger be ſtolen and waved by a Felon, the King himſelf ſhall not have them as Waifs, otherwiſe of the Goods of a Common Perſon. *Vid.* 31 *Ed.* 3. *cap.* 20.

In War, Merchants in an Enemy's Country, are privileged from any Violence to be offered them. *Grot. de jure belli & pacis, lib.* 2. *cap.* 11. *ſect.* 12.

There are likewiſe (for the accommodation of Commerce and Traffick) in all Countries, privileged Ships and Boats ſerving the Country or the Prince; which have great Prerogatives of being Free of Impoſts and Cuſtoms, and not ſubject to Arreſts. And all Ships are ſubject to this Service upon Command, and if they refuſe, the Ships are forfeited, by the Law *Maritime, Lex Mercat.* 110, 111.

If a Merchant commit any Offence, for which he is to be Amerced, this Amercement, ſhall be *Salvâ Merchandizâ ſuâ.* For that Trade and Traffick is the Livelyhood of a Merchant, and the Life of the Commonwealth, wherein the King and every Subject hath an Intereſt. *Magna Ch. cap.* 14. 2 *Inſt.* 28.

By the *Stat.* of the 5 *H.* 4. *cap.* 7. Merchants Alien ſhall be uſed in this Realm as Denizens be in others.

To call a Merchant Alien Bankrupt is Actionable. *Turloot cont. Morriſon. Tel.* 198. 1 *Bulſt.* 134.

A Man delivered Kerſies to be ſold in *Spain*, the Factor ſells to one who becomes a Bankrupt, and it is a Law in *Spain*, that if the Factor enter it before a Regiſter and had a Teſtimonial, that he ſhall be diſcharged. And the Court ſaid we will judge here, that he ſhall be diſcharged. *Caps* and *Tucker.* 2 *Rolls Rep.* 497.

Debt upon a Bill by a Merchant to pay Foreign Coin amounting to ſo much, to be paid upon the Feaſt of the Purification called *Candlemas day.* Upon *non eſt factum* pleaded, *Verdict* for the Plantiff. Moved in Arreſt of Judgment, that the Declaration was not good, becauſe Payment at *Candlemas* is not known in our

r Law, yet the Judgment was affirmed, for that ongſt Merchants ſuch Payment is known to be on e 28th of *February*, and the Judges ought to take tice of it, being uſed among Merchants, for the intenance of Traffick, *Perriſon* and *Pounteys* Caſe, *l.* 135. 1 *Brow.* 103.

XVI. All other Subjects are reſtrained to depart e Realm, to live out of the Realm, and out of e King's Obedience, if the King ſo thinks fit; but erchants are not, for they may depart, and the ame is no contempt, they being excepted out of the tatute of 5 *R.* 2. *cap.* 2. And by the *Common Law* hey might paſs the Seas without Licence, though ot to Merchandize.

Mich. 12 & 13 *Eliz.* *Dyer.* *fol.* 295. *Paſch* 23. *Eliz.* *fol.* 375.

XVII. It was once conceived, that thoſe Laws which were prohibitory againſt Foreign Goods, did not bind a Merchant-Stranger; but it was ruled otherwiſe: For in the Leagues that are now eſtabliſhed between Nation and Nation, the Laws of either Kingdom are excepted; and therefore as the *Engliſh* in *France*, or in any other Nation in Amity, are ſubject to the Laws of that Country where they reſide; ſo muſt they of *France*, or any other Country be ſubject to the Laws of *England*, when reſident here; and therefore if a *French-man* imports any Points, Laces, Belts, Hats, and the like, they are forfeited.

19 *H.* 7.

Tomlinſon qui tam verſ. Henry de vale, Paſch. 36 *Eliz* in the Exchequer.

XVIII. The marking of Goods is of a great conſequence, as in relation to the ſetling the property of the Merchandize in the right Owner; and in Courts of Juſtice, both the *Civil Law* and the *Common Law* hath a great reſpect to the ſame, therefore the uſe has been, that every particular Merchant hath his particular Mark appropriated to him; by which means, if the Perſon is of any value conſiderable, as in relation to Commerce, his Mark is preſently known.

Every Merchant is to ſet down his Mark upon his Book of Accompt, wherewith his Commodities are marked; ſo Companies and Societies have their particular Mark: No Merchant ought to uſe another Mark, without leave firſt had of the Party whoſe Mark

The Cutlers of *London* do give to each Member a particular

Mark, which cannot be uſed or appropriated, without a particular order and leave of the Company and Party, and ſo other Companies, 2 *Cro. fol.* 471.

Mark the ſame is; for as Flags are the Enſigns th[at] give conuſance of the Nation whoſe Ships they a[re,] ſo Marks are to aſcertain the Owners of their Pr[o]perty, without confuſion or damage: And thou[gh] to ſet the Mark of another Man alters not the Pr[o]perty, yet it may work ſuch a detriment as may [be] very miſchievous; and therefore by the *Common L[aw]* of *England*, if *J. S.* ſhall maliciouſly ſet the m[ark] of *J. D.* upon his Goods, to the intent *J. D.* ſhal[l] may be brought into any trouble, or put to any [da]mage or charge, an Action of the Caſe will lie agai[nst] *J. S.*

CHAP.

CHAP. VIII.

Of Factors.

Factors, their qualifications generally conſidered, in reference to their employment.
Of Commiſſions, and the words in the ſame, that qualifie them in their employment.
II. Of Commiſſions to Factors that limit their actions.
V. Of a Factor that deals for ſeveral Merchants, of the Obligations that oblige, and not oblige each other.
V. Of their power, conſidered in reference to the diſpenſing with the Debtors of their Principals.
VI. Where the falſe Entry, or unfaithfulneſs of the Factor ſubjects him to anſwer damage to his Principal; and of the like committed by the Principal, where to anſwer to the Factor.
VII. Of Goods remitted to Factors, and loſt in their poſſeſſion, who bears the misfortune.
VIII. Bills of Exchange drawn on the Factor by the Principal, and accepted, but before day of Payment the Principal becomes Bankrupt, whether the ſame muſt be paid.
IX. Of Freighting of Ships by a Factor, where he is obliged to ſee the ſame diſcharged.
X. Of the general Rules to be uſed touching the Conſtruction of their Actions.

I. A Factor is a Servant, created by a Merchant's Letters, and taketh a kind of Proviſion called Factorage, ſuch Perſons are bound to anſwer the loſs, which happens by over-paſſing or exceeding their Commiſſion; but a ſimple Servant, or an Apprentice can only incur his Maſter's diſpleaſure. The *Spaniard* hath a Proverb, *Quien paſſa Commiſſion, pierde Proviſion; He that exceeds his Commiſſion, ſhall loſe his Factorage:* But Time and Experience hath taught them to know better things; for now it is, *Subolca la paga, His Purſe muſt pay for it.* The gain of Factorage is certain, however the ſucceſs of the Voyage proves; and it is the prudence of Merchants to chuſe honeſt and induſtrious Perſons, for otherwiſe the Factor may grow rich, and the Merchant poor, the firſt being ſure of his Reward, the latter uncertain of his Gain.

II. In

II. In Commiſſions they now generally inſert theſe words: *Diſpoſe, do, and deal therein, as if* were your own; by which the actions of the Factor are to be excuſed, though it turns to his Principal's loſs, becauſe it ſhall be preſumed he did it for the beſt, and according to his diſcretion.

III. But bare Commiſſion to a Factor, to ſell and diſpoſe, will not enable him to truſt, or give further day of payment; for in the due execution of his Authority, he ought on a Sale to receive *quid pro quo*, and as he delivers one to receive the other; for otherwiſe by that means, as they may truſt ſix Months, they may truſt ſixteen years: Nor by the virtue of that Clauſe, of *Doing as if it were their own*, may they truſt out to an unreaſonable time, as ten or twenty years inſtead of one, two or three Months, which is the cuſtomary time for the like Commodities: And ſo it was adjudged, where one had remitted Jewels to his Factor in *Barbary*, who diſpoſed of the ſame to *Mulleſhack* the Emperour, for a Sum certain to be paid at a time, which being elapſed, the Factor not obtaining it, was forced to make the ſame good to his Principal.

7 Jac. B. R. Rot. 416. Barton & Saddocks. Bulſt. 1. part. 103. Yelv. 202. 2. Mod. 100, 101.

IV. Again, one and the ſame Factor may act for ſeveral Merchants, who muſt run the *joynt riſque* of his actions, though they are meer Strangers to one another; as if five Merchants ſhall remit to one Factor five diſtinct Bales of Goods, and the Factor makes one joynt Sale of them to one Man, *who is* to pay one moiety down, and the other at ſix Months end; if the Vendee breaks before the ſecond payment, each Man muſt bear an equal ſhare of the loſs, and be contented to accept of their Dividend of the Money advanced.

Salk. 126.

But if ſuch a Factor draws a Bill of Exchange upon all thoſe five Merchants, and one of them accepts the ſame, the others ſhall not be obliged to make good the payment, *Tamen quære de hoc.*

Mich. 17. Jac. C. B. Van. Heath verſus Turner, Winch 24, 25.

V. And as the Authority and truſt repoſed in Factors is very great, ſo ought they to be provident in their actions for the benefit of their Principals; and therefore if Factors ſhall give time to a Man for payment

nt of Monies contracted on Sale of their Princi-
Goods, and after the time is elapſed, they ſhall
l Goods of their own to ſuch Perſons for ready
h (leaving their Principals unreceived) and
en ſuch Man break, and become inſolvent, the
ctor in equity and honeſty ought to make good
e loſſes, for they ought not to diſpenſe with the
n-payment of their Principals Monies, after they
come due, and procure payment of their own to
other Man's loſs; but by the Laws of *England* they
nnot be compelled.

VI. Yet if Goods are remitted to a Factor, and upon arrival he ſhall make a falſe Entry at the Cuſtom-houſe, or land them without the Cuſtomer, whereby they ſhall incur a ſeizure or forfeiture, whatſoever the Principal is endamaged, he muſt inevitably make good, nor will ſuch general clauſe help him as above: But if a Factor makes his good Entry according to the Envoice, or his Letter of Advice, and it falls out the ſame are miſtaken, if the Goods ſhall be loſt, yet the Factor is diſcharged. *Leviſon verſus Kirke, Trin. 7. Jac. in B. R. Lane's Rep. 65.*

And as Fidelity, Diligence, and Honeſty are expected from the Factor, ſo the Law requires the like from the Principal, judging the Act of one to be the Act of the other; and therefore if a Merchant ſhall remit counterfeit Jewels to his Factor, who ſells and diſpoſes them for valuable Conſiderations, as if they were right, if the Factor receives any loſs or prejudice thereby, by Impriſonment, or other Puniſhment, the Maſter ſhall not only make good the damage to the Factor, but alſo render Satisfaction to the Party damnified: And ſo it was adjudged, where one *How* was poſſeſſed of three counterfeit Jewels, and having Factors in *Barbary*, and knowing one *Southern*, a Merchant, was Reſident on the place, conſigns thoſe Jewels to his Factor, who receiving them, intreated *Southern* to ſell thoſe Jewels for him, telling him that they were good Jewels; whereupon *Southern*, not knowing they were counterfeit, ſold them to the King of *Barbary* for eight hundred pounds (they being worth really but one hundred pounds) and delivered the Money to the Factor,

Hill. 25 *Jac.* 2 *Rolls.Rep.* 5 *B. R. Cro.* 2. *part.* 468. *Bridgman* 126, 127. *Popham.* 143, not reſolved in that Book.

Factor, who remitted the ſame to *How*; the Kin *Barbary* not long after finding himſelf cozened, co mitted *Southern* to Priſon till he repaid the ei hundred pounds. Whereupon *Southern* coming t *England*, brought his Action againſt *How*, and Judgment to recover his damage; for the Princ ſhall anſwer for his Factor in all caſes where h privy to the Act or Wrong: And ſo it is in Contra if a Factor ſhall buy Goods on the account of t Principal (eſpecially if he has uſed ſo to do) Contract of the Factor will oblige the Principal to performance of the Bargain.

Hill. 43. *Eliz.* *B. R.* *Petty's* and *Soame's* Caſe, *Goldsbr.* *fol.* 137.

VII. When Factors have obtained a *Provenu* profit for their Principal, they muſt be careful h they diſpoſe of the ſame, for without Commiſſi or Order they muſt be reſponſible. Goods rem ted to Factors, ought in honeſty to be carefully p ſerved, for the truſt is great that is repoſed; a therefore a Factor robbed, in an Account brought a gainſt him by his Principal, the ſame ſhall diſcharg him. * And ſo it is if a Factor buys Goods for his Principal which afterwards happens to be damnifie the Principal muſt bear the Miſfortune: *But if* Factor ſhall diſpoſe of the Goods of his Principal, an take the Money that is falſe, he ſhall there mak good the loſs; yet if he receives Monies, and after wards the ſame is by Edict or Proclamation leſſene in value, the Merchant, and not the Factor, mu there bear the loſs.

* *Southel's* Caſe, *Cok. lib.* 4. *fol.* 83.

Again, in Letters of Credit, the Factor muſt be ſure to ſee, whether the Commiſſion is for a time certain, or to ſuch a value, or not exceeding ſuch a Sum, or general, in which he muſt have a careful Eye.

VIII. A Merchant remits Goods to his Factor, and about a Month after draws a Bill on him, the Factor having Effects in his hands, accepts the Bill, then the Principal breaks, againſt whom a Commiſſion of Bankrupt is awarded, and the Goods in the Factor's hands are ſeized; it has been conceived, the Factor muſt anſwer the Bill notwithſtanding, and come in a Creditor for ſo much as he was enforced by reaſon of his acceptance to pay.

Quære, If equity may not relieve in ſuch caſe.

IX. If

X. If a Factor enters into a Charter-party with a ſter for Freightment, the Contract obliges him; if he lades aboard generally the Goods, the Prin-als and the Lading are made liable, and not the ctor for the Freightment.

The Principal orders his Factor, that as ſoon as he th loaded, (he having Monies in his hand) to make Aſſurance on the Ship and Goods, if the Ship hap-ns to miſcarry by the Cuſtom of Merchants, he all anſwer the ſame, if he hath neglected his Com-iſſion; ſo it is if he having made an Aſſurance, and ſs hath occurred, he ought not to make a Compo-ion without orders from his Principal.

X. Generally the actions of Factors do depend on uying, Selling, Freighting, and all other the Heads at have been treated in the Second Book, by which eir employment is univerſal in Matters Maritime nd of Commerce; and the queſtions which would riſe touching the ſame if treated on, would be *in finitum:* However theſe are to be the Standard *rules* hich ſhould govern their actions, *viz.* honeſty, aithfulneſs, diligence, and obſerving of Commiſſi-n, or Inſtructions, which being conſidered, and eighed by thoſe that ſhall be Judge of their Actions, right underſtandining and determing of the matters ariſing between them and their Principals, would ſoon be ended.

But thoſe ſorts of Factors that have wanted thoſe things, ſeldom or never render any other account, but long and tedious Chancery-Suits, by which they not only have endamaged their very Trade, but ſeek to marry their Principals to a double affliction, by obliging them to ſue either a Beggar, or that which is worſe, a naughty Man.

On the other hand, Factors that behave themſelves worthily and prudently in the Service of their Principals ought after their tedious Service be numbered amongſt thoſe that juſtly challenge that worthy denomination of *Merchant:* And ſuch was he who never made breach of Commiſſion in the ſervice of his Principal, but once; that was, when Wines were committed to him to diſpoſe of, but the price (by

reaſon

reaſon of a glut) fell, advice being given to the Principal of the ſame, who immediately in paſſion writes to his Factor to take a hammer and knock out the heads; but the Factor conſidering (that leave muſt be given to loſers to ſpeak) knew better things, and kept the Goods, and ſold them for their full value; and when Accompts were to be made, inſtead of bringing to the Accompt of Wines, their heads knock'd out *per order*, worthily brought *per contra*, ſold at their intrinſick value. Such faithful Miniſters, I ſay, juſtly deſerve that of our Saviour, *Well done*, &c. and to be no more called Factors, but Merchants.

CHAP.

CHAP. IX.

Of the Laws of Nature and of Nations.

Of the variety and contrariety of humane Actions, and from whence they ſpring.
Of the difficulties that happen in the obſtructing our Inquiſition in finding that which is lawful.
. Humane Laws from whence they flow, and wherefore the Laws of Nature are above ours.
. No Man naturally more a Judge than another of Nature's Laws.
. Nature's Laws are inſtituted for inward goodneſs and virtue, but State-Laws for quiet and repoſe.
I. *Of Puniſhment required by Kings againſt thoſe that violate the Laws of Nature or Nations, though the ſame touch not them, nor their Subjects, and of puniſhing an equal.*
VII. *Of puniſhing an equal, where that right fails, and the reaſons of the ſame.*
VIII. *Subjects ought not to ſeek Juſtice in the Territory of another Prince, but in their own, unleſs the Defendant become Fugitive,*
IX. *Of Kingdoms equal in Power cannot be commanded, but entreated, may be to execute the Judgment of another by the Law of Nations.*
X. *That ſuch power of executing the Judgments or Decrees of any Foreign Nation, extends not to thoſe of Life, or Honour.*
XI. *Of executing the Judgments given in a Kingdom abſolute, in another that is annexed by Conqueſt; and of the difference of that, and one by Union.*
XII. *Where that right fails in Plantations, and the reaſon of the ſame.*

I. PLain reaſon ſhews us, that Natural and Mathematical Cauſes have more certitude than Civil; for Nature is always uniform and alike in its operations: Hence Fire always burns, and never wets; a Stone in the Air naturally tends downwards, and never ſtays in the middle. In Mathematical Cauſes, ordinarily the forms are ſuch, as have no middle interpoſed, as between even and odd there is no *medium participationis*; between a right line and a crooked, there is no middle ſort of line; thus two and two always make four.

II. But

II. But civil and humane actions proceeding fr[om] a mutable and various Principal (the Will *) ca[n]not always be alike or uniform: And beſides t[he] Will within, humane Actions without, are ſubject [to] different Circumſtances, and to infinite Encounter[s] by reaſon of which their exceſſive number, they ca[n]not be foreſeen while Men are making Laws: He[nce] we may underſtand wherefore it is ſaid, *Omnis de[fi]nitio in jure eſt periculoſa*; and that *ſummum Jus* at ſom[e] time may be found *ſumma injuria*; as to render a M[an] his Sword, when he is actually mad, *&c.* And a[s] Circumſtance hath power to change the matter, ſo [the] the form of the Action, it leaves in the middle a la[ti]titude, ſometimes inclining to one extreme, ſom[e]times to another.

* In quid naturale ſit ſpectandum in his quæ bene ſecundum naturam ſo habent, non in depravatis, Ariſt. Polit. 1. 5.

For Example, betwixt that which by precept we are commanded ever to do, and that which we are commanded never to do, is placed that which is lawful for us now and then to do, or not to do, in matters of our own right ſo far as they ſeem expedient, or not expedient for us: Thus *Joſeph* is called a juſt Man, becauſe he thought of divorcing himſelf from *Mary*, though upon circumſtances he would not, *&c.* But that which perplexes us all here is, that this *licitum* leans ſometimes more to the one hand, ſometimes more to the other, ſometimes more to that which is abſolutely bad; from whecne grow ſcruples and doubtings, whether in ſuch twilight we really participate more of light than of darkneſs; that is, more of good than of bad.

Non ideo id Deum velle, quia juſtum eſt ſed juſtum eſſe (that is due in Law) *quia Deus voluit* Anaxarchus apud plutarchum in Alexandro.

III. Humane Laws grow moſt out of theſe middle things, *ex mediis licitis*; and upon right examination we find, that a Man hath nothing elſe to diſpoſe, for we (poor ſubordinate Veſſels) cannot ſo much as deliberate *de abſolutè debitis*, and *abſolutè illicitis*, for they were in force before Man, Prince, or People were in being, and God himſelf cannot now alter them, they flowing intrinſically, either from his Sanctity, Wiſdom and Juſtice, as he is a Creator and Governour; or elſe they flow from Nature, whoſe rule (according to God's making it by that which is in himſelf) its right reaſon and honeſty. This up-

Vaſqu. 11. *Controv.* 54.4.

Grotius de Jure Belli ac Pacis, l. 1. *c.* 1. §. 14.

rightneſs

ghtneſs of Nature, together with that obligation
e have to be ſubject to it, was not a moment after
, and therefore we could not determine any
ing about it; for which cauſe we have not a
giſlative Power to alter or diminiſh any of Nature's
aws.

IV. St *Paul* tells us, of thoſe *who without any after*
nowledge of God's revealed Will or Laws to Man, were
ndemnable by th ſe of Nature alone in the puniſhing the
eakers thereof. No Man is naturally more a Magi-
rate than another, otherwiſe what meant *Cain*, when
ter his Murder he cryed, *Whoſever ſhall find me, will*
ll me?

V. And though humane Laws remember us of thoſe
hings, yet it is not as if they gave their original and
rimary force of obliging; yea, reaſon of State is
ot buſied ſo much about inward Piety and Vertue,
s it is about publick quiet and repoſe, or thoſe acti-
ns which regard another Man's receiving right or
rong: And hence it is that great prodigality is not
o ſeverely puniſhed as a little robbery; and that
alus homo poteſt eſſe bonus Cives, the reaſon is, be-
cauſe though he may do himſelf wrong in his own
ights, yet he may always do other Men right in
theirs; neither is there any clear reaſon, wherefore
thoſe leſſer Sins and Impieties ſhould be puniſhed by
any but God, who is wiſeſt to know them, juſteſt to
weigh the merit of them, and powerfulleſt to puniſh
them.

This is the ſtate of God's, and of Nature's Laws,
to which we are all equally obliged, but our floating
and circumſtantiated Laws are only to give a rule
for an equal and mutual community in things, which
God and Nature gave us to diſpoſe of as we would
our ſelves.

VI. Hence it is, that Kings, and ſuch as have e-
qual power with Kings, have a right to require pu-
niſhment, not only for Injuries committed againſt
themſelves or their Subjects, but for them alſo that
do not peculiarly touch themſelves; as where Perſons
commit Actions in violation of the Law of Nature
or of Nations, for the liberty by puniſhments to

 proved

provide for humane Society (as hath been already mentioned) was in the hand of every Man; but after Commonwealths and Courts of Juſtice were ordained, it reſided in the hand of the higheſt Powers, not properly as they are over others, *but as they are under none:* For ſubjection to others has taken away that right; yea, ſo much more honeſt it is to vindicate other Mens injuries than our own, by how much more it is to be feared, that a Man in his own by too deep a reſentment may either exceed a meaſure, or at leaſt infect his Mind; however, this right of puniſhing an equal remains ſtill in thoſe places where the People remain as in great Families, and not in Cities, or under ſome Government; and therefore thoſe that have now Poſſeſſions of any parts of the New World, or *American* Iſles, till they have either voluntarily ſubmitted to a Government, or put them and their diſcovery into the hands or protection of ſome Prince that may exerciſe power, there remains the old and natural right of puniſhing for offences: So likewiſe where Perſons ſhall be aſſaulted by Pirates on the Seas, if they be overcome, they may be immediately executed by the Law of Nature; for otherwiſe there would be a failure of power to puniſh ſuch: Beſides, the old natural liberty remains in all places where are no Judgments; ſo where they are taken and brought to a Port, and the Judge openly refuſes the Tryal of them, or that the Tryal of them cannot be had, without an apparent detriment and loſs to the Captors, Juſtice may be done upon them by the Law of Nature.

Grotius de Jure Belli ac Pacis, lib. 2. cap. 21.

Vide Chap. Piracy, §. 11, 12.

Leg. extant. D. quod metûs.

VII. Two Pirates reſolving to aſſault and rob the next Veſſel they meet with, (not knowing each others condition or deſign) encounter, and the one happens to be overcome by the other; the queſtion is now, whether the above-mentioned right ſo far remains, as that the ſtronger may execute him whom he hath overcome? Right Reaſon dictates, that the evil-doer may be puniſhed, not who ſhould puniſh him; but that Nature ſufficiently ſheweth, that it is moſt convenient to be done by him that is Superiour; yet doth it not demonſtrate this to be neceſſary, u-

Qui non reddit faciendo quod debet, reddet patiendo quod debet, Philo. *Peccare dum feſtinatis, ad pœnas ferendas* [illegible] *imatis.*

except Superiour be taken in that ſenſe, that the evil-doer be thought to have made himſelf thereby inferiour to any other, and to have as it were degraded himſelf from the order of Men into the number of Beaſts ſubject to no Man, and ſuch are Pirates, who have no other denomination but Night-wolves, or Beaſts of Prey. By Nature it is ordained, *That the better command the worſe:* And *Ariſtotle* ſaith, *The worſe are provided for the uſe of the better as well in Naturals as in Artificials.* It follows hence, that at leaſt a guilty Perſon ought not to be puniſhed by another equally guilty, to which purpoſe is that Saying of Chriſt, *Whoſoever of you is without ſin* (that is ſuch ſin) *let him throw the firſt ſtone:* Pertinent is that ſaying, *The Sentence can have no authority, where he that judgeth is to be condemned:* From whence it follows, that the right of puniſhing in ſuch caſe, at ſuch time ceaſes. *Ariſt. 7. Pol. 14.*

VIII. On the other hand, Subjects that have juſt cauſe of Action, and inhabit under their own Sovereign, ought not to wave his Juſtice, and fly into the Territory of another, but ought to ſeek it in their own, unleſs the Defendant becomes Fugitive. One *Richard Hieron* being a Merchant of *London*, and Liege-man of the King, and born in *England*, commenc'd a Suit againſt *J. Walden* Major of the Staple of *Calice*, and other Merchants of the Staple, cauſed them to be arreſted in *Flanders* in the Court of the Duke of *Burgundy*, held in *Bruges*, for certain Injuries ſuppoſed by them to be made within the Juriſdiction of the King of *England* at *Calice*, and after the Defendants did appeal to the Paliament at *Paris*, and were there diſmiſs'd by a Judicial Sentence, for that they had no Cognizance or Ground to inquire or examine matters committed within the Juriſdiction of the King of *England*, and by his Subjects there inhabiting in a Foreign Court, the Record does make mention, that this was an act ſo derogating from the Law, and of ſo high a Contempt, that it was enacted, Que brief de Proclamation iſſera, luy commaundant a ſurceaſar ſon dit action, & que s'il ne amies ſue les dits Defendants hors del Realm d'Angleterre per aſcun matter determinable under the *Rot. Parl. 17 E. 3. num. 26. cited in Rolls Abridgment tit. Prerogative fol. 176.*

the Juriſdiction and Obedience of the King of *En-land* u'on [illegible] ion. The Judgment gi-ven—Donque il ſerra &c. he ſhall be put out of the protection of the King of *England*, and forfeit all his Lands, Tenements, Goods, and Chattels, and that no Pardon ſhall be to him available.

IX. Yet Kingdoms which are equal in power, and having no dependance on each other, cannot be commanded nor corrected of another; but if there be a queſtion, to execute the Decree or Judgment of one in the Territory of the other, there may iſſue forth a Commiſſion of Entreaty under the Seal of that Court where the Judgment was given, or at leaſt under the Great Seal of the Prince, directed to the Judges in that place where the Defendant is reſi-dent, and the Judge to whom the ſaid Commiſſion is directed may award Execution, according to the Laws of Nations: And ſo it was adjudged, where one having recovered a Debt before the Governour of *Frieſland*, the Defendant upon that fled for *England*, the Governour, at the Requeſt of the Plaintiff iſſued forth his Commiſſion of Requeſt, directed *Omnibus Magiſtratibus infra Regnum Angliæ, rogans*, to make Execution of the ſaid Judgment; upon which the Judge of the Admiralty in *England* iſſued forth an Execution of that Sentence, and the Defendant was taken, upon which he brought his *Habeas Corpus*, and adjudged the Sentence well executed by the Laws of Nations, and according to the *Common Law* of this Realm.

1 Ro. Ab. 530.
1 Lev. 267.
1 Sid. 418.
1 Ven. 32.
2 Keb. 511, 610.

So likewiſe if a *Dutch-man* takes up Goods at the Port of *London*, and gives a Note under *his hand* for the payment of the ſame, and then flies into *Holland*, the Vendor may apply himſelf to the *Lord-Mayor* of *London*; and upon proof of the delivery, and the Sale of the Goods, the *Lord-Mayor* making a *Certifi-cate* of the ſame, and ſending it under the City-Seal, directed, as above, they of *Holland* will and do execute the ſame upon the Party.

Herein this laſt Caſe differs from the firſt; for by the former, if there ſhould fall a queſtion about the interpretation of the Judgment or Sentence, the ſame

me cannot be done, for they are not to examine e ſame; and the reaſon is, leſt the Stranger be duced at another time to do the like, and ſo diſ- lve the Judgments whereof they ſhould demand the xecution, the which would be done more through alouſie of the State, than for any injuſtice in them: eſides, the Judgments or Sentences, which are mat- rs of Record, and of the greateſt ſecurity in a King- om, the preſumption that they were juſtly given, iall always be underſtood.

X. But in the latter the ſame may be examined, hat is, the Merchant may be heard as to his legal efence, either to the leſſening or diſcharging the ebt or damage, but againſt the teſtimony certified, io objection can be made, but the ſame is admitted, s legally proved.

But if there be a queſtion of honour or life, there they may not execute the Judgments of Foreign Judges, eſpecially if they have not known the merit of the Cauſes, or ſeen the Informations, or heard the Witneſſes; but more eſpecially in *England*, for there can in no reſpect whatſoever the life of a Man (let his offence be never ſo heinous) be brought to puniſhment without a legal Tryal, * and that by the producing of Witneſſes *viva voce* to his face; yet Princes for the reſpect they bear each other, and for the good of Juſtice, though they cannot at the bare requeſt of the Judges of another Prince, put them to death; yet they may for exemplary puniſhments (which ought to be made upon the places where the fact was committed) yield the natural Subject to his natural Prince, unleſs the Prince to whom the Fugitive is fled, finds that he is unjuſtly purſued; for in ſuch caſes he is not bound to yield them; yea he is forbidden by the Law of God to reſtore a bond-man, which is fled into another Man's houſe to avoid the fury of his Maſter.

* *Coke* 4. *In-ſtit fol.* 38.

Soto de Juſt. & Jure, l. 5. *qu.* 1. *Art.* 7. *Statius judicamus eſſe paucos aliquos mala ferre, quam immenſam multitudinem*, Zonaras

XI. And as the ſame is in caſes Foreign, ſo likewiſe in thoſe Eſtates that are under the *Crown of England*; and therefore if a Man recovers againſt * *J. S.* in the King's Bench in *England*, and then the Defendant flies over into *Ireland*, the Judgment may be

* *Paſch.* 24. *Car* 2. *in B.R. in Hibern. inter Warde* and *Moor*.

 certified

certified over into the *Chancery* in *Ireland*, and they may by *Mittimus* ſend it into the King's Bench there, and they may award execution, or otherwiſe the Party may bring his Action of Debt on the ſame; ſo the like has been done for Decrees given in the *Chancery* in *England*, which have been exemplified under the Great Seal, directed to the King's Lieutenant for the putting the ſame in execution there; but in no caſe a Judgment given in *England* may be certified over under any other Seal but that of the Great one.

Vide the Act of Parliament for the Union of *England* and *Scotland*.

But in *Scotland* it is otherwiſe; for that is a Kingdom abſolute, and not like *Ireland*, which is a Crown annexed by *Conqueſt*, but the other is by Union; and though they be united under one Prince *ad fidem*, yet their Laws are diſtinct, ſo as if they had never been united; and therefore the execution of the Judgments in each other, muſt be done upon Requeſt, as above, and that according to the Laws of Nations.

XII. But *Colonies* or *Plantations*, which are reduced into the condition of great Families, have not this Right of Requeſting, for they are governed by the Laws preſcribed by the Sovereign of the ſame, who may ſet Juriſdictions, and make them places priviledged, not to have the Perſons attached or arreſted in any other places, but within their own bounds, ſo likewiſe upon their firſt forming or Inſtitution, may ſo declare that for any Debt or Contract made or done in any place but in that of the ſame *Plantation*, they ſhall not be impleaded; and therefore in *Virginia* at this day, if a Man contracts a Debt in *England*, and flies to the ſame, he cannot be there impleaded: But if a Man takes up Goods, and carries the ſame over thither, there he may be ſued in the place; ſo likewiſe if it can be proved he carried over the Money borrowed, and this amongſt others of the Laws and Conſtitutions of thoſe *Plantations*, is preſerved inviolably, the ſame being as it were a pledge and general ſafety, which is given to thoſe Inhabitants that ſhall reſort thither, and there plant themſelves for the good of the place; and although

thoſe

ſe that thither fly, by reaſon of great and unre-
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ence follow that the ſame ought to be exacted;
r though the *Carcaſs* of Man may gratifie the Re-
nge of the Creditor, yet it never can pay the
bt; wherefore if thoſe ends by themſelves in a
oral eſtimation be not neceſſary; or if other ends
n the oppoſite part occur, not leſs profitable or ne-
eſſary; or if the ends propoſed by Impriſonment
ay be attained any other way, it will then follow
hat if there be nothing of obligation on the Deb-
ors part, to render himſelf a Priſoner to the Cre-
litor, that then if the ſame can or may be avoided
by flight, the ſame in conſcience may be done;
according to that of *Cicero* *, *It was not fit perhaps to diſmiſs him being brought to Judgment, but that he ſhould be inquired after, and brought to Judgment, was not neceſſary.*

* *Ad Quintum Tract.* 1. 21.

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